Submitted by Pl in error
No brief by Respondent

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted] 130

JOHN O. YEISER, PLAINTIFF IN ERROR,

vs.

T. B. DYSART, FRANK S. HOWELL, NELSON T. PRATT, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

FILED JULY 26, 1924

(28,766)

(29,768)

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 21, 1924

[fols. 1 & 2] [Caption in Supreme Court of Nebraska omitted]

[fol. 3] IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

In the Matter of Charges Brought Against JOHN O. YEISER on Alleged Misconduct as Attorney at Law

ORDER MAKING EVIDENCE PART OF RECORD, ETC.

Whereas complaint was made to this Court of oppression and extortion and misconduct practiced by John O. Yesier, attorney at Law, and

Whereas a committee of practising attorneys at the bar of Douglas County has examined into and investigated such charges and made a report thereon to this Court after having taken the evidence of the said John O. Yesier and other witnesses under oath, and

Whereas said report of said Bar Committee together with a transcript of the evidence taken before it has been filed in the office of the Clerk of the District Court.

It is therefore ordered that the evidence so taken and the report thereon be made a part of the records of this Court in said proceedings.

It is further ordered that the said John O. Yesier appear in Court Room No. 1 on the 1st day of September, 1922, at 9.00 o'clock A. M., for such disposition of said matter as to the Court may seem proper.

It is further ordered that a copy of this order be served upon the said John O. Yesier by the Clerk of this Court at least five days prior to September 1st, 1922.

Dated August 21, 1922.

By the Court.

(Signed) Charles Leslie, Presiding Judge.

Entered August 22, 1922, Journal 200, Page 285.

[fol. 4] IN DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

RETURN TO ATTACHED NOTICE AND ORDER

Comes now Respondent & herewith returns the Order issued herein & notice attached with full report & showing following thereafter.

Omaha, Nebr., August 23d, 1922.

Mr. John O. Yeiser, 537 Peters Trust Bldg., Omaha, Nebraska.

DEAR SIR: Herewith enclosed find copy of Order entered in proceeding entitled "In the Matter of Charges brought against John

O. Yeiser," and in which said Order provides that copy be served upon you at least five (5) days before September 1st, 1922.

Very respectfully, Robert Smith, Clerk, by Asel Steere, Jr., Deputy.

[fol. 5] Service copy of order omitted. See side page 3.

[fol. 6] IN DISTRICT COURT OF DOUGLAS COUNTY

RETURN AND ANSWER OF JOHN O. YEISER—Filed August 31, 1922

Comes now your respondent, John O. Yeiser, and for return or answer to the attached notice says the evidence referred to, and the laws of Nebraska, do not justify such a recommendation as made by the Committee, although your respondent will not knowingly retain any sums of money referred to unless legally and morally entitled thereto.

It is not disputed that respondent and Mr. Conaway were engaged by Mrs. Burkman to try a suit for Twenty-five Thousand ($25,000.00) Dollars against the Street Railway Company and respondent claimed the oral agreement was to start the Street Car case first and delay the other suit in hopes the Company actually causing the death could be made to pay an adequate amount and have it settled, possibly before exhausting the inadequate remedy for compensation, the constitutionality of which act was being contested in the Supreme Court in other litigation.

Respondent claims there was a contingent agreement to fight the whole claim in both cases in the order mentioned for a contingent fee of 50%, and that the daughter was to be appointed administratrix. This was all agreed to, but not reduced to writing because said administratrix had not yet been appointed and was overlooked afterwards, because she had never returned to the office—the business being conducted by Mrs. Burkman.

Respondent says the street car case was tried in District Court and lost, but after consultation over the facts, respondent and Mr. Conaway were instructed by Mrs. Burkman to appeal said case to the Supreme Court. A Motion for a new trial was filed and the case is now pending in the Supreme Court.

In the settlement referred to under the Workmen's Compensation Act against the Blue Taxi Company, respondent in addition to the [fol. 7] money received, obtained an allowance of Two Hundred Fifty ($250.00) Dollars which was not contested, but paid although this claim was doubtful then and is not recoverable now, and in addition respondent obtained an agreement of the defendant and indemnity company to waive their right of subrogation and waive their right under the law to be reimbursed from any recovery of damages caused by a third party, injuring said employee—so that all recovered would go to Mrs. Burkman subject to claim of attorneys.

Respondent alleges that in view of the defeat and necessity of appeal the first recovery was had on the Workmen's Compensation Act, he and Mr. Conaway did not insist upon a literal compliance of the contract, but took in the neighborhood of 25%, leaving the balance for a later recovery, all with the consent of Mrs. Burkman, upon which occasion the following receipt in full was executed:

"Received of John O. Yeiser check for $3,104.16, less his charges and charges of Mr. Conaway for 25% authorized to the deducted, same being in full.

(Signed) Anna M. Burkman."

July 5/21.

Respondent never had any dispute with his client over said transaction, but the matter was made public by said complaint and inquiry with a shorthand reporter and these proceedings from which respondent did not wish to cover up or prevent being made public if desired by any one interested.

Respondent alleges the question of law is based upon Sec. 3649 of the Statute quoted by the Committee which provides:

"No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this article shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the districts in which such issue arose. After [fol. 8] such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation."

The Committee proceeded upon the theory that this section is regulatory of the contract between the employee and his attorney, whereas it makes no such unconstitutional attempt at abridging contracts or contractual relations concerning the power of contracting and rights of labor, but the said Section relates only to restricting the mere lien rights upon the funds in the hands of the adverse party. We have an authority upon this in construing a similar Section of the Workmen's Compensation Act of Iowa:

In Kratz v. Holland Inn et al. 173 N. W. 292:

"* * * On October 11, 1916, Owens without the intervention or knowledge of the plaintiff entered into an agreement with the Liability Company for a settlement of his claim against the Holland Inn for $30, which sum was then and there paid to him. This settlement was reported to the industrial commissioner of the state, and by him approved, and the same was thereupon confirmed by a decree of the district court of Linn county. * * *

* * * The present action was begun before a justice of the peace against the Holland Inn and its insurer. The plaintiff's petition sets

out the facts hereinbefore stated, and therein asks for judgment against both defendants for $15. On the trial, the facts were stipulated by the parties substantially as we have related them, and the justice entered judgment as prayed by the plaintiff against the defendant Holland Inn, but found he was not entitled to recover from the Liability Company. To review this latter finding and the judgment relieving the insurer from liability the plaintiff applied to the superior court of Cedar Rapids for a writ of error, and upon examination of the record, the writ was denied and judgment entered against plaintiff for costs. From this ruling and judgment the plaintiff appeals. * * *

* * * Now the Compensation Act does not create or impose upon the employer any liability to the attorney of his employe. That liability exists, if at all, because of another statute. The sole reference thereto in the Compensation Act is found in Code Supp. Sect. 2477m20, where it is said that no claim for the services of any attorney in securing a recovery under this statute shall be an enforceable lien thereon, unless the amount of the same be approved in writing by a judge of a court of record or by the Iowa Industrial Commission. The effect of this provision is to so limit the operation of the general [fol. 9] statute relating to attorney's liens hereinafter enacted that they may be enforced against employers under the protection of the written approval of a judge or of the Industrial Commission. In other words, to have a valid lien in such cases, the attorney must show compliance with the general statute on the subject of attorneys' liens, plus the observance of the requirements of Code Supp. Section 2477m20. The general statute to which we refer reads as follows: * * *

* * * It will be remembered that, according to the agreed statement of facts that at the date of the settlement with Owens no proceeding or action had been begun by Owens, or by plaintiff in his behalf, and under the provisions of this statute, plaintiff had not then acquired any lien, and, the money having been then paid, he could not thereafter acquire one.

Again it is provided that the lien shall date only from the time of giving notice thereof in writing to the adverse party, and it is conceded that no such notice was ever served on the appellee. These facts would seem to be conclusive against the assertion of a lien by the plaintiff in this case. * * *"

Respondent charges that most of the members of the Committee and Court have been misled. A fragmentary quotation of Section #3649 was made in such a way as to eliminate the part of said Section which controlled its meaning as being applied to the modification of the lien law, the same as the above case, and said unfair and misleading quotation in said report is as follows, to be compared with the fuller Section above:

"No claim or agreement for legal services or disbursements in support of any demand made, or suit brought under the provisions of this Article shall * * * be valid or binding in any * * *

respect, unless the same be approved in writing by the judge presiding at the trial, or in case of settlement without trial, by the judge of the district court of the districts in which such issue arose."

Please turn back and compare this with the full quotation above and with the decisions quoted in a similar law, and see the unconscious imposition inflicted by car-lessness of some member of the Committee, or read the same Section with interpretation in brackets as follows:

"No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this [fol. 10] Article—(this does not touch services instituting another suit under other law)—shall be an enforceable lien (it may be a moral lien or debt, but not enforceable)—against the amount to be paid—(this limitation is clearly directed against the money in the hands of the employer like any lien)—as damages or compensation or be valid or binding in any other respect—(What is it—what is the subject? Money to be paid. That is what they are talking about. How to have a lien that is enforceable)—unless the same be approved in writing by the judge presiding at the trial or in case of settlement without trial by the judge of the district court of the districts in which such issue arose. (Now what of this approval—what for?) After such approval if notice in writing be given the defendant for such claim, or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation."

This closing sentence brings the intention right to the subject of lien on money "to be paid." Therefore the phrase "valid or binding in any other respect" after the conjunction is a phrase so qualified both before and after that it relates to the validity and binding effect as a lien on unpaid money in the hands of an adverse party.

This money was not in the hands of the adverse party. It was paid over, reported to Mrs. Burkman, and settled by her voluntary agreement as to the amount to be retained, which was about one-half of the amount claimed for the original transaction. There was no dispute between them over the settlement. She had already ordered an appeal and she executed a receipt reflecting a settlement as stated therein.

Respondent charges that if the Statute the Committee rely upon can be strengthened by eliminating clauses which limit the law to the lien rights so that it would read as they have quoted it, it would abridge the power to contract for labor and services. It does not attempt this. If so construed such an act would be in violation of Section 10 of Art. 1 and Art. 15 and Art. 5 of Amendments to the Constitution of the United States, and to the Constitution of Nebraska.

[fol. 11] The Court will not try to construe a law against a constitutional provision which would void it if it could be given a constitutional construction.

Respondent alleges that the only charge against the fund in the hands of the employer is merely said restricted lien right subject to approval of the Court on amount of lien, and the law itself does not provide for an attorney's fee against the employer or his Insurer in any sum whatsoever as recently decided by the Supreme Court.

Under our law an employee is not denied services of an Attorney. He may be represented but there is no provision to make the employer pay them. It is left for contractual determination between the attorney and his client—with the attorney being restricted in his lien rights against the debtor in such an action where the money is still in the hands of the defendant.

In Abel Const. Co. et al. v. Goodman, 181 N. W. 713:

"* * * The Court also held that defendant was entitled to recover $414 for statutory waiting time, making a sum total of $1,326 and costs, for which, on October 23, 1920, judgment was rendered. In addition thereto the court taxed an attorney's fee of $200 as costs. Plaintiff contends that the court erred in permitting defendant to recover either for an attorney's fee or for statutory "waiting time." From the judgment plaintiff appealed to this court. * * *"

"* * * We think the court erred in the taxation of an attorney's fee as costs notwithstanding the Ocean Accident & Guarantee Corporation, Limited, the insurer of the employer, by some means that it is not necessary to discuss here, seems to have become a party plaintiff after the case reached the district court. In support of his argument on this point defendant invokes section 3212, Rev. St. 1913, as amended by Laws 1919, c. 103, Section 2. For the purpose of this discussion and the amendment is not material. The act as amended reads: * * *"

"* * * It is sufficient answer to say that the present case is not "an action at law upon any policy of life, accident, liability, * * * or other insurance.' It follows that section 3212 has no application to a cause brought under the Employers' Liability Act. * * *"

" * * * With respect to the taxation of an attorney's fee as costs the judgment is reversed. In all else the judgment is [fol. 12] affirmed, except that as to the statutory waiting time penalty it is ordered that the district court modify its judgment so that the total amount of defendant's recovery for waiting time shall be the sum of $6 a week for 75 weeks. * * *"

Respondent next quotes from a case in which the law and facts are almost identical with this case, excepting the lawyer did not invoke his constitutional rights of contract mentioned twice by the Court in the following case, as being waived:

In Schilling v. Industrial Accident Commission of California et al. 190 Pac. 373:

"* * * It appears from the record that the applicant, having been injured while in the course of his employment, consulted peti-

tioner, who is an attorney at law, and through his advice and counsel procured temporary compensation from the insurance carrier; that thereafter he obtained other employment, during the course of which he was again injured and again consulted petitioner; and that thereafter, as the result of further consultation with petitioner, he was advised that he might apply for permanent compensation as the result of the first injury upon medical testimony which it was deemed possible to procure at that time. This application was made through the advice and assistance of petitioner, and a partial hearing was had thereon before the commission, wherein the evidence was very unfavorable to the applicant; but thereafter, through the advice and activities of petitioner a settlement was made with the insurance carrier for $650, which was approved by the commission and subsequently paid. It further appears that at the time of the approval of this settlement the commission fixed the compensation for petitioner's legal services at $45 without a hearing; that at the request of petitioner a rehearing was granted by the commission for the purpose of determining the reasonableness of the order fixing such fees. Petitioner claimed that he had an oral contract with the applicant for the payment of one-third of the amount recovered from the insurance carrier, which amount included payment for legal services rendered by him to the applicant in matters not directly connected with the proceeding in which the recovery was had. He insisted [fol. 13] that this contract should not be declared void in toto, and that in any event the allowance of $45 was wholly unreasonable in payment for the legal services which he had rendered in the the proceeding before the commission.

As disclosed by the record filed by respondent herein, the attitude of the referee to whom the rehearing had been referred by the commission was extremely hostile and prejudicial to petitioner throughout the entire proceedings. Immaterial and irrelevant testimony was taken for the purpose of attacking the professional standing of petitioner; the referee took petitioner's witnesses out of his hands, conducted their examination in his own way, refused to permit petitioner to cross examine witnesses who were antagonistic to him, and studiously obstructed petitioner in his attempts to produce testimony favorable to his cause.

Counsel for respondent states that there is but one question involved in this proceeding, 'What was the value of the services performed by petition, * * *' or 'has the Industrial Accident Commission authority under sections 24 (b) (1) and 24 (d) of the Workmen's Compensation, Insurance, and Safety Act, to fix the fees of attorneys representing applicants before it?' This court is unable to determine the value of the services performed by the petitioner because the referee to whom that matter was referred for adjudication failed to give petitioner a fair opportunity to make proof of such value. That the Industrial Accident Commission has authority under the sections cited to fix fees can scarcely be questioned. Section 24, subdivision (b) (1), authorizes the commission to fix and determine a reasonable attorney's fee for legal services pertaining

to any claim for compensation or application filed therefor; no constitutional objection has been raised to this provision of the act, and it may therefore, in this proceeding, be taken for granted that the power is one which the commission may lawfully exercise. Subdivision (1) of the same section provides that 'no claim or agreement for the legal services or disbursements * * * - in excess of a reasonable amount, shall be valid or binding in any respect, and it shall be competent for the commission to determine what constitutes such reasonable amount.' No constitutional objection has been raised to this provision of the act, and for the purpose of this proceeding it also may be assumed to be valid. But it must be evident that if the obligation of a contract to pay for legal services, which has been executed by parties legally competent to contract is to be impaired by the order of the commission solely on the ground that it is unreasonable, some semblance of a judicial hearing must be accorded the contracting parties before such order is made. Furthermore, the jurisdiction of the commission is confined to the determination of the reasonableness of the fee to be paid to counsel for the legal services rendered to the applicant in connection with the proceedings before it, and does not extend [fol. 14] to the determination of the legality of a contract for the payment for legal services rendered in independent proceedings, even though such contract is made payable out of the award of compensation made to the applicant by the commission.

An applicant for compensation is entitled to be represented by counsel in proceedings before the commission. There is no odium attached to counsel who render such services. Though the efforts of the commission to protect the interests of applicants for compensation are highly commendable, it is just as important that other persons coming within its jurisdiction be treated with equal justice. If a party who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered seeks to avoid the obligation of such contract after the services have been rendered and the benefits retained by him, the attorney is entitled to a fair and impartial hearing before the commission on the question of the reasonableness of the fee which the contracting parties had agreed should be paid."

Respondent alleges that in repect to said constitutional question Elliott on Contracts states:

Section 2779 Elliott on Contracts:

"Section 10, article 1, of the Constitution of the United States provides that: 'No state shall * * * pass any * * * law impairing the obligation of contracts.' Article 5 of the amendments to the constitution provides that no person shall be deprived of his property without due process of law, and article 14 of the amendments strengthens and adds to article 5 by providing that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

"Section 2781. Freedom of Contract as a Constitutional Right.—The constitution seeks to preserve for the individual his right to personal security, his right to personal liberty and his right to private property. Liberty and the right to acquire and hold property means and includes the right to make and enforce contracts. Thus, the right to use, buy and sell property and to contract in respect thereto is protected by the constitution. The right to contract is a property right. This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. It is not a fundamental unrestrictable constitutional right, but is subject to reasonable restraint and regulation in the interest of the public welfare and public health. * * *"

[fol. 15] It cannot be that — contracts as old as law itself the relation of attorney and client is subject to police power—or in the class with usury, which grew out of unlawful trafficing in money since Bible days, nor is it in the class with child labor contracts in restraint of trade. Carrier contracts where the public is at the mercy of the carrier—hackman—and business prejudicial to public safety. If an attorney's right to contract for his labor may be regulated and prescribed, so can a farmer's or an engineer's, or a painter's or a doctor's labor be prescribed and that section of the Constitution be the same as not written so far as contracts are concerned. But, as to this case, with a proper construction of the legislative act quoted, there is, as stated in the case in 190 Pacific Reporter, no necessity to argue the constitutionality.

Reverting to Section 3649, which under Abel Construction Co. et al. v. Goodman 181 N. W. 713, the Court held no attorney's fee could be taxed, which left that section limited to a lien on money to be paid, and we find no provision regulatory of the contract between attorney and client.

In the last Northwestern, Volume 187, page 919, the subject was passed upon again in construing an entirely new provision enacted by the Legislature in 1919, holding an attorney's fee may be taxed against the defendant as a matter of costs in favor of the plaintiff. This law does not pretend to regulate the contract between attorney and client, but is a mere item of costs chargeable by the Court to the adverse party and made recoverable by the plaintiff, much as the same item is taxed in a divorce case. The case referred to is Western Newspaper Union v. Dee, 187 N. W. 919. In this respect it is as follows:

"Was an attorney's fee properly allowed? The answer depends on the terms of the statute. In 1919 the act was amended and now contains the following provision:

'Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and pro-

[fol. 16] ceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award, the appellate court shall in like manner allow the plaintiff a reasonable sum as attorney's fees for the appellate proceedings.' Rev. St. 1913, #3666; Laws 1919, c. 91.

Though this provision was inserted by amendment after defendant was injured, the attorney's fee relates to the remedy and may be taxed as an item of costs in entering judgment on a claim that arose before the amendatory act was passed. Reed v. American Bonding Co., 102 Neb. 113, 166 N. W. 196, L. R. A. 1918 C, 63; Johnson v. St. Paul Fire & Marine Ins. Co., 104 Neb. 831, 178 N. W. 926. From the compensation commissioner plaintiff appealed without reducing the award. An attorney's fee, therefore, was properly taxed in the district court and the amount allowed does not seem to be unreasonable."

The motion for new trial in this case was overruled and the transcript is docketed in the Supreme Court, the Bill of Exceptions have been served and the case will be presented there. Respondent, during September, paid the reporter $90 for a bill of exceptions, $6.50 to the Clerk for a transcript, and $10 to the Clerk of the Supreme Court and probably will have an additional expense of $100 for briefs.

Respondent not only held the sum of money in question under a contract but under a lien which has never been decided adversely by any judicial decision.

Under any view of this case where there were two items of employment of service and where good faithful work was performed, and is still being performed, and the charge was so reasonable as this, when no demand was ever made, but this proceeding entertained without the attorney knowing of any dispute with his client, the proceeding seems, as respondent believes, unjust to him.

Mrs. Burkman testified on the last page of the Record:

"Yes, I know there was all those things and I appreciated everything Mr. Yeiser and I am sorry to cause you trouble but it wasn't I that started it."

She had repeatedly said that she had never had trouble with re- [fol. 17] spondent. She admitted she knew the amount of money deducted and knew she signed the receipt to so settle. She admitted after she was defeated she then advised an appeal to be taken.

Respondent feels satisfied a good recovery should be had against the Street Railway Company far in advance of any compensation recovery and that this stirring up and attempt to make Mrs. Burkman dissatisfied with her cou-sel, embarrasses said litigation and is one of the greatest injuries being inflicted upon this woman, who should recover for the grossest negligence of this Company directly resulting in this death.

Something was said about Respondent mentioning Court allowance. But Mrs. Burkman confessed the approval of the Court for a lump sum settlement—which we had taken several weeks to agree upon after much correspondence. Mrs. Burkman referred to that when she said on page 64 as follows:

"Mr. Frazier: Well, when he told you the court allowed him that much you mean in the compensation case?
Mrs. Burkman: That is what he said he was going to have. I couldn't say, well you go back and fight it with them again. The judge said that was what I was going to have I would have to be satisfied."

It is clear she understood respondent had fully and honestly reported the facts, but the question is directed in such a way as to suggest such a fraud which was a little bit unfair, as it was equally unjust to prepare an affidavit for her to sign, charging respondent had lost her right of appeal. And as it was also unfair to single only one attorney out in a case where two were equally associated and equally shared in the money received.

In this respect respondent quotes the following statements from the record having a bearing upon this case under the law to show the extent of dispute of testimony by Mr. Conaway and relator showing the agreement to take the two cases together the subsequent employment to appeal and facts of settlement:

[fol. 18] Unstable Contradictions

Mrs. Burkman's statements from page 36:

Q. Did you ever agree to pay Yeiser attorney fees?
A. No, I never did.

Mrs. Burkman's statements from page 9:

Q. What did you say about compensation case, as to attorney fees?
A. Never mentioned that at all, but he said he was looking after it for me and I waited and waited.
Q. Did he say he was going to charge you something?
A. No, no never said that.
Q. Did he say he was going to do it for nothing?
A. No, but he said he was looking after it and I waited and waited.

Attempt to Deny Fairness of Settlement

Mrs. Burkman's Examination page 45:

Mr. Frazer: Were you alone with Mr. Yeiser at the time you received this money?
Mrs. Burkman: On Farnam Street, I met him and he took me down to the Merchant's Bank and there he gave it to me.

Mrs. Burkman—page 11:

A. I wasn't there at the final settlement. I just met Mr. Yeiser on Farnam Street and we took the street car and he gave me a check for $3,104 and some change on the Merchants Bank and we went down there and never *so* anybody.

Page 22:

Q. And when I finally made the settlement, did I not explain to you that settlement and tell you that in making the settlement I had obtained an agreement with the insurance company that they would waive their right to make you reimburse them——

A. (Interrupting.) Yes, and I told Mr. Kennedy.

Q. And he said it couldn't be done?

A. Yes, Mr. Kennedy said it couldn't be done.

[fol. 19] Q. And you remember an agreement I showed you signed by the insurance company?

A. I don't remember—you never showed me, but you told me.

Q. I told you——

A. Yes, and I went up and you said, I have got that.

Page 25:

A. I met you on Farnam Street and went down to the bank with you and with that money and deposited it and I paid Mr. Yeiser and never seen anything.

Q. Did you sign a receipt?

A. Yes, sir.

Q. You remember coming to my office, sitting at my desk, and after talking with Mr. Conaway and myself about carrying out the agreement we had in that respect?

A. I can't read it, only my name.

Q. You remember signing it?

A. Yes, but I thought it was a receipt for the money.

Q. You remember my reading it——

A. (Interrupting.) You told me it was so, I wouldn't have to pay any. (Money back to Taxi Company.)

Mr. Yeiser: Reads the receipt.

A. I don't know anything about it, the judge had that to do.

Q. Yes, but you knew we would get whatever allowance could be made to apply on it and this was to be done by reason of our general agreement to fight these two cases along together and then make a final settlement.

A. Yes, but the case is out of the Supreme Court.

Page 62:

Mrs. Burkman: I was awarded fifteen dollars a week, I never asked Mr. Conaway and Mr. Yeiser to do anything. I was in there and when he settled the case we were alone in his office. He had me

come so often and the reason was because he was going to settle the case.

[fol. 20] Mr. Yeiser: I thought you said I met you on the Street?

Mrs. Burkman: Now it slipped my mind. I was away out ten blocks from the street car and Mr. Yeiser called me up and said come down he was going to settle that case.

Later Engaged for Appeal

Mrs. Burkman, Page 20:

A. We settled it that time then you said you would appeal it to the Supreme Court. You never talked to me anything about it after that. Just asked you every time when it was coming up.

Mrs. Burkman, page 18:

Q. You wanted this case appealed didn't you?

A. Sure, but then you said—I didn't understand anything about it.

Q. You understood it was before daylight this happened and we had witnesses who testified there was no headlight on, isn't that true?

A. Yes sure.

Q. And then we had witnesses that testified that he turned his car around on the right side just before Dewey came north, and Dewey swung around and ran into the car without a light?

A. The way I understood the boy was coming up Grace and this butcher had the car——

Q. The automobile turned in his path?

A. Yes.

Q. And Dewey had to swing around him which run him into this street car coming south?

A. Yes.

Q. And after the trial you wanted me to rely on my own judgment and wanted me to take care of it the best I could and try and get it reversed, isn't that true?

A. Yes.

Q. And I told you that in my judgment he was wrong and I hoped to get it reversed?

A. Yes, you said you was going to appeal it to the Supreme Court, go into the Supreme Court.

Mrs. Burkman, page 22:

[fol. 21] Q. Now at that time in going ahead it was your desire to prosecute it and get money for the boy's death?

A. Yes, I thought that was the thing to do, I left it to you.

Mrs. Buckman, page 10:

Q. Then he appe*la*ed that compensation case to the district court, did he? He appealed to a higher court?

A. Yes, I think so.

Q. Then did you have a talk about how much fees he would charge you?

A. Never—never. Never talked about no fees to Mr. Yeiser about the compensation because they allow it to me.

Q. But you talked about fees in the case against the Street Car Company?

A. That is all we were talking about.

Q. How much was he to get for that work?

A. But he was going to take it out of the case if we won. If we didn't we would have nothing to pay.

Q. If you won it you don't remember how much he was to take?

A. No, not exactly, but we were not to pay anything if we did not win the case.

Q. You remember that definitely?

A. Yes, positively.

Things Difficult to Understand

Mrs. Buckman, page 18:

Q. Mr. Larson in Kennedy's office is related to you or your daughter, isn't he?

A. No, sir, he is not.

Q. Not related to any of you?

A. No.

Mrs. Mortenson: He is related by marriage. I never seen him. He is not related to me, he is related to my husband.

[fol. 22] A. (Continued.) He is no relation to me at all.

Mrs. Burkman, page 17:

A. Yes, I haven't done anything to it but I told Mr. Yeiser, Mr. Kennedy said I should have more. I explained to Mr. Kennedy he said he settled that so I wouldn't have to pay it back if I got any money from the street car and Mr. Kennedy said it couldn't be done.

Mrs. Burkman, page 16:

Q. Was that the first time you ever heard anyone say you ought to have more?

A. Yes, that's the first time.

Q. Then who did you make complaint to?

A. Mr. Kennedy done that, he went with me.

Mrs. Burkman, page 17:

Q. Did you complain to Mr. Yeiser about it?

A. No, just told him I told him that I told Mr. Kennedy he said he had settled.

Mr. Switzler: 25 per cent of both.

Q. Or any other percent—that is what is bothering the committee, when the law says you can't take anything out of the compensation allowance other than what the court allows you. That is the law, the legal question that is bothering this committee. It isn't so much, as I understand it, what you people agreed, it is what you had a right, under the law, to agree to.

A. Could she buy real estate with it after she got the money.

Q. There isn't any question like that. Let's take this case. Your first understanding, your contract was originally lumping the two cases, one a compensation, the other damages for negligence. You don't know whether you can recover or not so you enter into a contract, in consideration of my looking after this compensation case and this negligence case, you are to pay me 25 per cent of the total sum that I recover in the two cases, and afterwards you recover four thousand dollars in the compensation case and six thousand dollars in the personal injury. You take twenty-five hundred dollars out of the two cases because the two cases total ten thousand dolars?

[fol. 23] A. That was my impression. I haven't looked it over.

Q. One more assumption. Suppose you have these two cases and they result in getting four thousand in the compensation and defeat in the personal injury case, do you think under the compensation law you can take out one thousand dollars?

A. I think if there was a legal contract engaging services in addition to that and pledging what was to be gotten on that, I believe it would be all right.

By Mr. Frazer: Mr. Yeiser, is it your contention, that prior to the filing of the street car case and prior to the trial of the compensation case you had an understanding of twenty-five per cent?

A. Fifty per cent, and I made a concession and went on I felt bad about losing the street car case.

Q. Do I understand you claim you had a contract with Mrs. Burkman prior to the trial of the street car case?

A. In the very beginning.

Q. That you were going to bunch the two cases and have fifty per cent of what was recovered in the two cases?

A. Yes.

Q. Then, I understand that if the Street Car Company ultimately win, you would have been entitled to two thousand dollars out of the compensation.

A. That would have been the terms, but I feel more hopeful of winning that case.

Mr. Howell: Did you get an affirmance of the board allowance in the District Court and then settle in lump on that?

A. I am not quite sure, I think so.

Q. In arriving at the settlement, who paid it?

A. The Insurance Company.

Q. And you claim you got a larger allowance from the Insurance

Company in the form of a lump sum settlement because of the waiver of the insurance company to make no claim.

A. Because if we did win this we would have to pay back every dollar of the allowance.

Q. Of the injury suit?

A. Yes.

[fol. 24] Q. You think you got a better settlement by way of recovery than you might get in the negligence case?

A. Yes, much better.

Q. If you had recovered $3,900 in the negligence case you would have to pay it all back?

A. Yes, sir.

Q. But if you get $3,900 and don't have to pay this sum back you have doubled the amount?

A. Yes, sir.

Q. If you had made this lump settlement of $3,900 without this waiver and then got a verdict for $3,900 in the personal injury suit would — have had to pay back the entire $3,900 allowance?

A. Yes, sir.

Q. Whereas by this settlement for $3,900 and the waiver, if you get another $3,900 out of the personal injury suit you will have two $3,900 instead of just one?

A. Yes, sir.

Q. There is one thing that is bothering me. The purpose of the compensation law, as I understand it, is to allow no compensation whatever under any pretense or evasion in the way of compensation.

A. Attorney fees you mean?

Q. I mean attorney fees. Until that money absolutely becomes the property, by lump sum settlement, and goes into the hands of the beneficiary, into the hands of the party entitled to it. Then when that settlement and money goes into the hands of the party entitled to it that party can take that money and buy anything on earth that he or she wants to buy, lawyers' services, real estate or oil stock and there is no criticism. What is bothering me in this case you have entered into a contract whereby through lumping or bunching or marshaling, call it what you may, the ultimate result is that you get more than a court has allowed you. That is elemental, that is my conception of the law. What I want to know is, assuming that you had a contract, that you would take two law suits, one of which you had a right to contract for ninety per cent if you wish, and one on which you had a right to make no contract at all, and you said inasmuch as I can take ninety per cent of one and no contract for the other, I will take fifty per cent or forty per cent— that is the point in my mind.

A. I think it is permissible, and in addition to that after losing [fol. 25] this case, and desiring to go right to the Supreme Court and ratifying it and directing the case to be carried to the Supreme Court, I felt I was doing right and treating the woman fairly.

Q. I am not prepared to say that you are not doing what is right, but it is a legal question.

E. A. Conaway, page 49:

A. This is the way I understand that, and from personal conversation with Mr. Yeiser and also the times with Mrs. Burkman. In the first instance, when they were in the office at the time the case was taken, as I say, I thought it was fifty but it may have been forty per cent, but it was for the two cases, to go straight through, whether recovery was had in both or whether in one.

Q. Is it your understanding that if the Street railway case is lost and there is never any recovery that under your contract that your fee would be fifty per cent of the amount recovered in the compensation case?

A. No, because later Mrs. Burkman frequented the office with her private affairs, generally trouble she and her daughter were having, and trouble she was having with various people. She would come up to see Mr. Yeiser and he wouldn't be in and I would talk with her and she made some mention about she thought the fee was a little too much and I told her to see Mr. Yeiser about it and talk it over with him, and then Yeiser told me he had decided to make it twenty-five per cent on this compensation case.

A. Well, Mr. Frazer, I will say in answer to that question, this: during the years I have represented insurance companies over a period of about seven years, I don't know of a case where that was adhered to because I have had many discussions over it myself, telling people that was what was generally said. The Court approves a fee taxable against the defendant, but that isn't the total fee a lawyer can collect against a client under contract. In fact, I have myself in compensation cases charged considerable more than the court allowed, and in fact we told Mrs. Burkman that the court would allow a fee but it wouldn't be sufficient, as I have always told my clients that the court would allow a nominal fee but I wouldn't take a compensation case on such a fee as the court would approve, although Judge Sears allowed Mr. DeBord, for a half day's trial $600 fee out of $3,500 case, and that was only a half day's trial.

Q. A compensation case?

A. Yes.

[fol. 26] In conclusion respondent submits to the court that this proceeding has been unjust to him and that instead of being compelled to defend against any charge of the Court that said report be not concurred in, but that same be set aside.

John O. Yeiser.

Jurat showing the foregoing was duly sworn to by John O. Yeiser omitted in printing.

[File endorsement omitted.]

[fol. 27] IN THE DISTRICT COURT OF DOUGLAS COUNTY

SUPPLEMENTAL REPORTS OF MEETINGS OF BAR COMMITTEE—Filed November 10, 1922

"Dysart & Dysart, Lawyers, 746 Omaha National Bank Bldg., Omaha, Neb.

Oct. 13, 1922

Hon. Charles Leslie, Presiding Judge of the District Court of Douglas County, Nebraska, Omaha, Nebraska.

DEAR SIR: In Re-Charges against John O. Yeiser, Attorney:

I believe that since the report of the committee heretofore filed in the above entitled matter was referred back to the committee, that each member has given the matter careful consideration, and I am informed that each of the other members of the committee have communicated to you by writing or otherwise their views in the matter.

As I understand it Mr. Pratt and Mr. Howell have written letters *descenting* from the former report and that Mr. Fraser and Mr. Switzler in effect adhere to their former opinions.

As for myself I adhere to the recommendations made in our former report, that Mr. Yeiser should return the money retained by him over and above the amount allowed by the court in the compensation case. However, I believe the findings of our former report would reflect my convictions more nearly if we had found that the evidence failed to establish an agreement to handle both cases on a percentage basis instead of our finding that there was an agreement to handle the compensation case for such sum as the court might allow, as I am convinced from the evidence that Mrs. Burkman never understood Mr. Yeiser was to handle the compensation case on a percentage basis. This change in the findings would not affect our recommenations as to the return of the money, for the only theory on which Mr. Yeiser could claim the right to retain the money would be that he had an agreement to handle the compensation case as well as the Street Car case on a percentage basis.

I hardly think it is the province of this committee to decide constitutional questions, and, if your Honor should find that the theory that there was no agreement as to the compensation case is correct, then the constitutional question of the infringement upon the right of contract does not enter into this matter.

Respectfully submitted, (Signed) J. T. Dysart.

JTD/EMW."

[fol. 28] "Law Offices of Crofoot, Vinsonhaler, Fraser, Connolly & Stryker, Omaha National Bank Bldg., Omaha

L. F. Crofoot, D. M. Vinsonhaler, W. C. Fraser, C. F. Connolly, Hird Stryker

Oct. 10th, 1922.

Hon. Charles Leslie, Court House, Omaha, Nebr.

DEAR JUDGE:

Re Complaint vs. John O. Yeiser

I have been furnished copy of the letter written you by Nelson C. Pratt, one of the members of the Committee, concerning the above case and note from same that he has apparently changed his mind and is now intimating that the Committee's report should be withdrawn and the proceedings dismissed.

The majority of the Committee, Messrs. Dysart, Switzler and Fraser, found from the testimony that Mr. Yeiser agreed to perform the services in the workman's compensation case for whatever was allowed by the Court, and, as I understand it, are still of that opinion. It is not disputed by any of the Committee but what Mr. Yeiser's charge was in contravention of the statute covering attorneys' fees in workman's compensation cases but claim is now made that that provision of the law is unconstitutional.

Mr. Yeiser testified that at the time he made the charge he had never read the provision of the statute in question and was wholly ignorant thereof so that he is not in any position to make a defense on the theory that he acted under the belief that the law was not valid.

Mr. Pratt suggests that his services were worth the amount he charged because he secured an agreement from the insurance company waiving any right to reimbursement from moneys collected from the Street Railway Company. I cannot agree with this suggestion. No recovery has been had against the Street Car Company and up-to-date Mrs. Burkman has not received any benefit on account of this agreement.

Mr. Pratt in his communication distinguishes the Iowa case which Mr. Yeiser principally relies on. It is different than the Nebraska statute and in my judgment the Nebraska statute is entirely constitutional. I believe that if lawyers undertake the handling of a compensation case, charged with notice of the law governing fees, that they will be bound by the allowance made by the Court, particularly in view of holdings of the Supreme Court of Nebraska that an employer and employee cannot make settlement between themselves. If this be true, certainly it is proper for the legislature to [fol. 29] regulate contracts between the injured party and the attorney.

Personally, I am sure the Committee gave a great deal of consideration to this case. Two hearings were had. Mr. Yeiser was given every opportunity to present any defense that he had and if the matter is to be taken up again with the Committee and rehashed the result will be that the Committee will soon have to give up their

private law practice and listen to rehearings on every complaint brought before them.

Yours very truly, (Signed) W. C. Fraser. M.

WCF/CM."

"Law Offices of Smith, Schall, Howell, Howard & Sheehan, Omaha National Bank Building, Omaha, Nebr.

E. P. Smith, W. A. Schall, F. S. Howell, W. H. Howard, F. E. Sheehan

October 6, 1922.

Honorable Charles Leslie, Presiding Judge of the District Court of Douglas County, Nebraska.

DEAR SIR: As a member of the committee of attorneys appointed by you to deal with charges against members of the Douglas County Bar, I signed the report heretofore submitted as to Mr. John O. Yeiser. Partly at my request the report was referred back to the committee for further consideration. I have carefully reconsidered the case and beg to submit additional views.

I have read the letter of Mr. Nelson C. Pratt of this date and concur in much that he says. It is proper to say that the charges were not made by Mrs. Burkman for some considerable time after she settled with Mr. Yeiser in the Compensation Case, nor until she was informed that Mr. Yeiser had over-charged her. This may be attributed to her ignorance as to her supposed rights under the law. [fol. 30] In giving her testimony it clearly appeared that she was not in the least familiar with court proceedings, legal terms, just what papers she signed, their nature or purpose, nor what they contained, although she knew in a general, but vague, way that Mr. Yeiser was to handle the Compensation Case and the Negligence Case on terms which were not perfectly clear in her mind. She seemed positive no mention was made as to a percentage fee in the Compensation matter and was also positive that she agreed to pay forty per cent in the Negligence Case. She did not know whether she signed a contract for fees or just what she did sign, although she knew that she signed some papers. The burden of her complaint was that Yeiser had neglected the Negligence Case and had lost her right of appeal from an adverse ruling of the District Court. The records of the court disprove the latter claim.

Mr. Yeiser testified with equal, if not more exact, positiveness that "in the beginning" of their negotiations there was an agreement that he would handle both cases upon a percentage basis (fifty per cent, he thought, but was not sure of that and was willing to accept Mrs. Burkman's statement that it was forty per cent) of what he recovered in both cases.

Both Mrs. Burkman and Mr. Yeiser were somewhat corroborated in their respective versions, each having one witness at least. I am convinced that both were conscientious and neither wilfully made mis-statements. I am further convinced that in the matters about which they testified, Mrs. Burkman, with her means of knowing

and understanding, was more or less confused and had a more or less indefinite conception of what actually took place when she first sought the services of Mr. Yeiser, while Mr. Yeiser had a better knowledge and understanding of things then done, and told what happened with more reliability or else he wilfully told a false story, a conclusion to which I cannot bring myself.

Having come to this conclusion on the testimony, the case then presents two additional questions:

1. The constitutionality of Section 3649, R. S. 1913, which prohibits contracts from becoming liens under the Compensation Law, and saying contracts shall not be "binding in any other respect" except by the approval of the court given in writing.

Mr. Yeiser testified that he was not mindful of that provision when he made the contract nor, perhaps, until after he made settlement with Mrs. Burkman. If not, then he did not act in wilful defiance of law, nor in a state of mental corruption, nor unethically up to that time. Had he known of the terms of the statute, whether valid or invalid, no doubt it would have been his duty to have informed his client before getting her into a contract at variance with the terms of the statute.

Up to this point I am unable to see any justification in reporting in favor of sustaining the charges made against Mr. Yeiser.

2. After Mr. Yeiser learned of the statute, having already with-[fol. 31] held from his client $620.00 more than the terms of the statute permitted, was it his duty to return the money to her, sue on his contract and contest the constitutionality of the statute in so far as it related to the right to contract for fees without approval of the court, or to hold the money and compel his client to bring suit or give it up without a struggle. This question is by no means easy of solution.

I doubt the power of the legislature to control the right to contract in such cases but concede it to be debatable. In ordinary cases I concede the right to trial by jury on all questions of fact, and in many cases, this right should be given attorneys in disputes with clients before they can be censured, but undue advantages gained over clients must not be confused with the right to trial by jury.

Mr. Yeiser claims two constitutional rights—trial by jury and the right to contract. The first of these is not involved, since, if the statute is valid, he had no right to the contract and should not so deal with a client as to force a trial by jury, or any other kind of trial, upon the client which involves expense, annoyance and the loss of the use of the money. If he made the contract in god faith, in ignorance of the terms of this statute (and ignorance of the law on the part of an attorney it would seem is no better ground for barring him or suspending him from practice, than ignorance or mistakes on the law are grounds for impeachment of judges) and if the statute is void, I do not see where he has obtained any unfair or undue advantage of a client as Mr. Yeiser rendered services of equal value to the amount of money he retained, in that he so handled the Compensation Claim that, no matter what became of the

Negligence suit, Mrs. Burkman would not have to give up to the Insurance Company any part of the compensation agreed in settlement.

If the statute is valid I see nothing to complain about what Mr. Yeiser did through ignorance, until, after being advised of the statute, he refused to restore the $620.00 to Mrs. Burkman.

My conclusions are that both Mrs. Burkman and Mr. Yeiser made the contract claimed by him in good faith; that the constitutionality of that part of the statute against the validity of such a contract without the written approval of the court is of doubtful validity; that whether Mr. Yeiser should be called to pay the $620.00 to Mrs. Burkman depends upon so many considerations which are not shown by the testimony, such as solvency or insolvency on her part, or solvency or insolvency on his part, and other considerations which as readily suggest themselves to the court as to me, that it cannot be determined upon the record as it now stands; that the question of the constitutionality of the statute referred to is too much in doubt to warrant censure, and that the charges ought to be dismissed.

The charges, in the last analysis depend entirely upon (1) whether there was a contract, (2) whether the contract was void in law, and (3) whether or not Mr. Yeiser should voluntarily yield up his contract without having the question of the validity of the conditions of the statute referred to, determined by the court.

[fol. 32] There is no claim that the contract was unfair or that what Mr. Yeiser actually received was unjust or inequitable. On the one side, charges depend upon a technical and constitutional question and Mr. Yeiser's right to retain the money depends upon the same technical question, unless we are prepared to say that an attorney should yield everything against himself or be censured, suspended from his practice and greatly injured in his moral and professional standing in the eyes of the public. I am not prepared to go to such lengths.

Respectfully submitted, (Signed) F. S. Howell.

FSH."

Nelson C. Pratt, Attorney and Counselor, Omaha National Bank Bldg., Omaha, Nebraska

October Sixth, 1922.

Hon. Charles Leslie, Presiding Judge of the District Court of Douglas County, Nebraska, Omaha, Nebraska.

DEAR SIR: In October, 1919, one Anna M. Burkman, employed Mr. John O. Yeiser, an Attorney at Law of Omaha, Nebraska, to represent her in a proceeding against the Omaha and Council Bluffs Street Railway Company on account of an accident which resulted in the death of her son, and also in her claim against the Blue Taxicab Company of Omaha, Nebraska, for compensation growing out of the death of her son while in the employ of said company.

It appears that Mrs. Burkman was depending solely upon her son

for her maintenance and support. Mr. Yeiser prosecuted the suit against the Street Railway Company and a verdict was returned in favor of the Company. The compensation case against the Taxicab Company was settled for a lump sum of $3,974. Mr. Yeiser retained out of the $3,974, $870 for his fees. The Court allowed an attorney's fee in the sum of $250 in the compensation case. The fee charged by Mr. Yeiser was $620 in excess of the allowance made by the court.

A committee was appointed by your Honor for the purpose of hearing charges made by Mrs. Burkman against Mr. Yeiser in that [fol. 33] he had charged an amount in excess of that awarded by the Court in the compensation case, and that he had not properly looked after the case against the Omaha and Council Bluffs Street Railway Company. This Committee made report to your Honor that Mr. Yeiser had charged the sum of $620 in excess of what the Statute authorized and that he should return this sum to his client, Mrs. Anna M. Burkman, and in the event that he failed to do so that he should be suspended from the practice of his profession in the District Court of Douglas County until he had made restitution.

At that time I believe that Mr. Yeiser should be required to return the amount in excess of $250 charged for his services, and I signed the report which provided that he should return the amount in excess of $250, believing it was a proper return for the Committee to make. I have since read the showing made by Mr. Yeiser to the effect that he should not be required to make restitution to his client in the sum of $620. I am now convinced that the report of the Committee was not correct and I believe that an injustice has been done Mr. Yeiser, and I now desire to withdraw my approval of the report that has heretofore been made by the Committee.

Mrs. Anna M. Burkman testified that Mr. Yeiser was to receive as fee in the compensation case whatever sum the Court should allow, and no more. Mr. Yeiser stated that the contract was that he was to take both cases together at an agreed compensation to be paid, equal to fifty (50) per cent of the recovery, contingent upon recovery, and that this arrangement was made in the very beginning. He, however, was not sure of the percentage and stated that if Mrs. Burkman claimed it was to be forty (40) per cent he would accept her version.

I am now convinced, in relation to this matter of dispute, that Mr. Yeiser should not be deprived of a hearing before a Court and jury on the question as to what the contract actually was, entered into between himself and Mrs. Burkman.

In relation to Section 3649 of the 1913 Statute, which seems to limit the amount charged for attorney fees in compensation cases to the amount allowed by the Court; in Mr. Yeiser's showing he refers to an Iowa case holding that the amount allowed by the Court under the Iowa Statute is not exclusive. However, the following appears in the Nebraska Statute,—"or binding in any other respect," which does not appear in the Iowa Statute, and for which reason the case cited by Mr. Yeiser is not an authority.

Mr. Yeiser raises the question that the Legislature of the State of

Nebraska has not the power to prevent an attorney from contracting for additional fees in compensation cases, and to that extent Section 3649 of the 1913 Statute is unconstitutional. Many lawyers so construe this Section and have acted upon it during the several years last past. The question at least is debatable, and I am convinced that Mr. Yeiser should not be found guilty of any moral turpitude or professional corruption based upon a Statute which in the minds [fol. 34] of many is unconstitutional, that this controversy should be lodged in a Court of proper jurisdiction and the rights of these parties there determined.

Mr. Yeiser obtained a settlement in the compensation case, as heretofore stated, in the sum of $3,974. If he had recovered the sum of $3,974 against the Street Railway Company the Insurance Company would have been entitled to have been reimbursed in that amount if it had not been for the fact that Mr. Yeiser obtained a waiver from the Insurance Company so that if he had actually recovered any sum from the Street Railway Company no part of this sum would have been repaid to the Insurance Company.

Without question the services performed by Mr. Yeiser in the compensation case were of the value of the amount that he charged Mrs. Burkman. In my opinion therefore, the Committee's report does an injustice to Mr. Yeiser and the proceedings against him should be dismissed.

Respectfully submitted, (Signed) Nelson C. Pratt."

[File endorsement omitted.]

[fol. 35] IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

JUDGMENT—Entered November 13, 1922

This cause coming on to be heard on the report of the Committee heretofore made to the Court and filed on the 21st day of August, 1922, and the objections thereto, made to said report by the said Respondent, and also upon the subsequent reports made in said matter by the individual members of the said committee, to-wit, F. S. Howell, Nelson C. Pratt, Wm. C. Fraser, and John T. Dysart, and the Court being fully advised in the matter finds: That the report as made to this Court by said Committee, and which was filed on the 21st day of August, 1922, should be, and is affirmed.

Wherefore it is hereby ordered, adjudged and decreed, That the said John O. Yeiser, Respondent be, and he hereby is, directed to refund and pay over to the complainant Mrs. Anna Burkman the sum of $620, as recommended by said Committee in their original report made to this Court, plus interest thereon at the rate of 7% from the 1st day of August, 1921, until paid.

It is further ordered, adjudged and decreed, that the said John O. Yeiser, Respondent, refund and pay over to the said Anna Burkman said sum within sixty days from date hereof, and that upon his failure so to do stand suspended from the right to practice as an attorney at law in this County until further order of this Court. [fols. 36 & 37] To all of which findings and decree said Respondent John O. Yeiser objects and excepts.

Dated this 13th day of November A. D. 1922.

By the court.

(Signed) Charles Leslie, Judge.

[File endorsement omitted.]

[fol. 38] IN SUPREME COURT OF NEBRASKA

OPINION—Filed March 27, 1923

1. Section 3031, Comp. St. 1922, construed, and held to limit the amount an attorney may lawfully charge or contract for, as compensation for legal services or disbursements, in demands or suits arising under the workmen's compensation act, to such sum as may be approved in writing by the district judge.

2. An attorney cannot enforce against a claimant for compensation any claim or agreement for attorney's fees, in a demand for suit brought under the provisions of the workmen's compensation act, for an amount in excess of that which is approved by the district judge.

3. Section 3031, Comp. St. 1922, restricting the amount an attorney may charge for legal services, in cases arising under the workmen's compensation act, to such sum as the district judge shall approve, is a proper exercise of the police power of the State and does not contravene the provisions of either the fifth or the fourteenth amendment to the federal Constitution.

4. District courts are vested with jurisdiction to suspend attorneys from practice in their judicial districts upon proper showing.

[fol. 39] Heard Before Morrissey, C. J., Rose, Aldrich, Dean, Day, and Good, JJ., Raper, District Judge

GOOD, J:

This case is brought to this court to review an order of the district court for Douglas county, directing appellant to refund $620 to his client, Anna Burkman, within 60 days, and, on failure so to do, that he stand suspended from the right to practice as attorney at law in said county until the further order of the court.

In October, 1919, a son of Anna Burkman, while in the employ of the Blue Taxicab Company of Omaha, and while in the performance of his duties as a driver, had a collision with a street car of the Omaha & Council Bluffs Street Railway Company, resulting in his death. Mrs. Burkman employed appellant to represent her, to recover from the Blue Taxicab Company under the workmen's compensation act. A Mrs. Mortenson was appointed administratrix of the estate of the deceased son of Mrs. Burkman, and Mr. Yeiser was employed by the administratrix to prosecute an action against the Omaha & Council Bluffs Street Railway Company for damages because of its alleged negligence in bringing about the collision, which resulted in the death of young Burkman.

Appellant contends that he made a contract with Mrs. Burkman and with Mrs. Mortenson, by the terms of which he was to prosecute both cases and receive as compensation 40 per cent of the amount recovered. Mrs. Burkman insists that the agreement [fol. 40] was that Mr. Yeiser should have such fee in the compensation case as the court might allow, and that he was to have a contingent fee of 40 per cent of the recovery in the action against the street railway company. The committee, appointed by the court to investigate and make report of the complaint, found that the contract between the parties provided that the compensation case against the taxicab company should be prosecuted by Mr. Yeiser for such fee as the court would allow him, and the action against the street railway company on the basis of 40 per cent of the amount recovered, and found that the compensation case was settled for a total lump sum of $3,974, and that the court allowed him, as attorney's fee in that case, the sum of $250; that Mr. Yeiser retained out of the $3,974 the sum of $870, or $620 in excess of the court's allowance.

The record shows that the action against the street railway company is still pending in the district court on a motion for a new trial, and that a settlement was made in the compensation case in July, 1921, whereby compensation was allowed to the extent of $3,974. Mr. Yeiser settled with Mrs. Burkman and paid her the avails of the compensation case, less $870, which he still retains, and asserts the right to retain, under the contract he claims to have made with Mrs. Burkman for compensation.

Appellant assigns as error that there is not sufficient evidence to support the finding and order; that the order is contrary to law; and that the court has no jurisdiction to enter such an order.

[fol. 41] The view we take of the questions presented for determination makes it unnecessary to determine whether the contract of employment in the compensation case was for the percentage of the recovery, as claimed by appellant, or for such fees as the district court would allow, as claimed by Mrs. Burkman.

1, 2. Section 3031, Comp. St. 1922, being a part of the workmen's compensation act, provides: "No claim or agreement for legal services, or disbursements in support of any demand made or suit brought under the provisions of this article shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or

binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the district in which such issue arose. After such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation; provided, however, where the employee's compensation is payable by the employer in periodical installments, the court shall fix, at the time of approval, the proportion of each installment to be paid on account of legal services and disbursements."

Appellant insists that this section of the statute, if properly construed, relates to attorney's liens, and does not place any restrictions upon the right of attorneys to contract for compensation in such cases, and, if it is construed to affect the right to contract for com- [fol. 42] pensation, that it would be unconstitutional, as interfering with the right to contract.

A careful examination of the statute quoted shows that it relates to claims or agreements for legal services and disbursements, as well as to liens for attorneys' fees, in actions or claims arising under the workmen's compensation act. By omitting the parts of the first sentence of the statute which relate to attorney's lien, the section would read: "No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this article shall be an enforceable lien * * * or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the district in which such issue arose." It seems too plain to admit of argument that the legislature intended to restrict and limit the amount an attorney could lawfully charge or contract for as compensation for legal services or disbursements, in demands or suits arising under the workmen's compensation act, to such fee or sum as should be approved in writing by the district judge. It necessarily follows that an attorney cannot enforce against a claimant for compensation any claim or agreement for attorney's fees in a suit or demand, brought under the provisions of the compensation act, for an amount in excess of that which is approved by the district judge.

[fol. 43] 3. Appellant argues that the statute, if construed to regulate or restrict the right to contract between attorney and client for fees for legal services, is in violation of the provisions of the federal Constitution which guarantee "rights in property," due process of law, and equal protection of the law, these constitutional provisions are intended to, and do, guarantee the right to make and enforce contracts as property rights, but the right to make and enforce contracts may be restricted and is subject to such limitations as the state, in the proper exercise of its police power, may impose. That is to say, it is subject to reasonable restraint and regulation in the interest of the public welfare. Laws regulating the rate of interest, commonly called usury laws; federal statute fixing the amount that may be charged for attorney's fees in pension claims; limiting the

charges of railroads for carrying passengers or freight; limitation upon the employment of women and children as to the hours of service and limitation upon the hours of service of adults in certain hazardous occupations; limitations upon the right to sell intoxicating liquors, explosives, firearms, poisons and deleterious drugs, and many others might be mentioned as an exercise of this power. Even in the workmen's compensation act under consideration, the law requires the compensation to be paid in periodical sums, and not in lump sum, except when authorized by the court. The question is as to whether the regulation is reasonable and is in the interest of the public welfare. If so, it does not conflict with the constitutional [fol. 44] provisions. It is a matter of general knowledge that a large percentage of the persons who come under the workmen's compensation act are not possessed of large means, but are dependent upon their earnings for the support of themselves and families. If the earning power of the bread-winner is destroyed or greatly impaired by an injury, he must look to the compensation provided by the statute for the support of himself and family, and, if this compensation may be depleted by an improvident or unreasonable contract for legal services, he and his dependents are likely to become public charges. It is in their interest, and the interest of the public as well, that they should be protected from contracts or charges for attorney's fees that are not reasonable. The statute does not fix an arbitrary charge, but leaves the amount to be determined and fixed by the judge. It will not be presumed that the judge will refuse to make a reasonable allowance or to approve a fair and just charge.

We hold that the statute is a proper exercise of the police power of the state, and is not repugnant to the provisions of the federal Constitution, guaranteeing rights in property, due process of law, and equal protection of the law.

4. Appellant contends that the district court is without jurisdiction to suspend an attorney from the practice of his profession. The precise question has been heretofore determined in this court, where it was held that the district court was vested with power to suspend an attorney from practice in that court, but that such order should [fol. 44½] be limited to suspension from practicing in the judicial district. In re Disbarment Proceedings of Newby, 76 Neb. 482.

It is but fair to appellant to say that he in good faith believed that said section 3031, when properly construed, did not limit the amount an attorney could lawfully charge or contract for as compensation for legal services or disbursements, as against a claimant for compensation in demands or suits arising under the workmen's compensation act, and his appeal to this court was largely for the purpose of having an interpretation of said section by the court of last resort.

While there is no error in the record, we think the order should be modified so as to permit appellant to comply with the order of the court within 20 days from the issuance of the mandate of this court before the sentence of suspension shall be effective.

As modified, the judgment of the district court is affirmed.

Affirmed as modified.

[fol. 45] SUPREME COURT OF NEBRASKA

[Title omitted]

JUDGMENT—March 27, 1923

This cause coming on to be heard upon appeal from the district court of Douglas county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court, but does find that said judgment of the district court should be modified so as to permit the appellant to comply with the order of the court within twenty days from the issuance of the mandate of this court before the sentence of suspension shall become effective, and as so modified that said judgment of the district court should be affirmed. It is, therefore, ordered and adjudged that said judgment of the district court be, and hereby is, modified so as to permit the appellant to comply with the order of the court within twenty days from the issuance of the mandate of this court before the sentence of suspension shall become effective, and as so modified [fol. 46] said judgment is affirmed at the costs of appellant, taxed at $—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Good, J.

A. M. Morrissey, Chief Justice.

[fol. 47] IN SUPREME COURT OF NEBRASKA

MOTION FOR REHEARING—Filed May 5, 1923

Comes now appellant and moves the court to set aside and vacate the judgment and opinion heretofore rendered for the following reasons:

I

Because the Supreme Court of the United States has subsequently passed upon legislation regulating wages for service in such a way as to be authority that the Nebraska act in controversy fixing attorney's fees is contrary to the V amendment and XIV amendment to the Constitution of the United States.

II

The court erred in holding act in question was not contrary to the V amendment and the XIV amendment to the Constitution of the United States in depriving appellant of property rights without due process of law and in not impairing the liberty and freedom of contract as shown by decision of the Supreme Court of the United States more recently made in what is known as the minimum wage decision.

[fols. 48 & 49] SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—June 15, 1923

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein denied.

A. M. Morrissey, Chief Justice.

[fol. 50] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed June 21, 1923

To the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States and the Associate Justices of the said Court:

Now comes John O. Yeiser plaintiff in error in the above cause and would show unto this Honorable Court that in the record and proceedings, and rendition of the decree in the above cause by the Supreme Court of the State of Nebraska on the said suit entitled as follows:

"In the matter of Charges against John O. Yeiser, Attorney at the Douglas County Bar. Said charges made by J. T. Dysart, Frank S. Howell, Nelson C. Pratt, W. C. Fraser, R. M. Switzler a committee appointed by the Court to investigate charges and alleges manifest error has occurred greatly to his damage whereby plaintiff in error feels aggrieved."

That in the record and proceedings it will appear that there was drawn in question the validity of Section 3031 Compiled Statutes of Nebraska, 1922, which reads as follows:

[fol. 51] "No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this article shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the districts in which such issue arose. After such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disburse-

ments, the same shall be a lien against any amount thereafter to be paid as damages or compensation: Provided, however, where the employe's compensation is payable by the employer in periodical installments, the court shall fix, at the time of approval, the proportion of each installment to be paid on account of legal services and disbursements."

[fol. 52] Plaintiff in error contended that in the construction of this Statute there was drawn into contention a construction of the XIV Amendment to the Constitution of the United States.

Plaintiff in error contends the said constitutional claim arose as follows:

Plaintiff in Error and E. A. Conaway, another attorney, were engaged to prosecute two actions upon a contingent fee. One was an action against the employer for death of a taxi driver who was killed by collision with a street car running without a head light before day light on a foggy morning, under the Workmen's Compensation Act; and the other against the street car company under the provision of direct liability for negligence of a third party. The case against the street car company was lost in the trial court, but is now pending on appeal in the Supreme Court of the State. Three thousand five hundred dollars was collected and paid over less Eight Hundred Forty dollars in round figures at much less than the contingent agreement owing to the fact that the main case was still unsettled. In the compensation case an attorney fee of $250.00 was allowed.

Complaint was made before the Court that the deduction made even under agreement between attorney and client was void because the statute quoted fixed the amount of recovery and that the excess retained over $250.00 should be returned, or $640.00.

Plaintiff in Error alleged in answer to the complaint that said statute did not assume to regulate the fees between attorney and client, but related only to attorney's liens and pleaded that if the court gave said statute such a construction as prescribing the amount of attorney's fees thereby such statute was violative of the XIV Amendment to the Constitution of the United States in depriving [fol. 53] Plaintiff in Error of his property without due process of law, depriving him of his property rights and liberty of contracting for his services and depriving him of equal rights under the laws of the country.

The said case was tried in the trial court upon the said complaint and the return or answer of plaintiff in error who was ordered to refund $640.00 within 20 days or stand suspended.

Plaintiff in error appealed to the Supreme Court of the State of Nebraska which was the Court of last resort in the State of Nebraska and there claimed the said Statute if construed as one fixing fees was contrary to said clauses of the XIV Amendment to the Constitution of the United States and the V Amendment as incorporated in the XIV Amendment for the control of States.

Plaintiff in error alleges that the Supreme Court of Nebraska decided adversely to plaintiff's contention and that said Statute did fix

the fees an attorney could charge and did prevent the making of a contract for fees, sustaining and affirming the decision below and specifically held that said statute so interpreted did not contravene any clause of the XIV Amendment and did not contravene any clause of the V Amendment to the Constitution of the United States and thereby held said statute as so interpreted was valid and not violative of such constitutional guarantees.

Plaintiff in error alleges that in the said decision the court did not consider any other question than the construction and validity [fol. 54] of said statute, under the said claim of constitutionality as set forth above excepting the one of its own jurisdiction. All of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herewith.

Wherefore, plaintiff in error prays that his appeal be allowed and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

John O. Yeiser, per se.

[fols. 55 & 56] Jurat showing the foregoing was duly sworn to by John O. Yeiser omitted in printing.

[File endorsement omitted.]

[fol. 57] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERRORS—Filed June 21, 1923

To the Honorable William Howard Taft, Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

And now comes the plaintiff in error John O. Yeiser and says that in the record and proceedings of aforesaid in the Supreme Court of Nebraska in the case entitled:

"In the matter of charges against John O. Yeiser, attorne- at the Douglas County bar by T. B. Dysart, Frank S. Howell, Nelson C. Pratt, W. C. Fraiser, R. M. Switzler, committee to investigate charges." And in the rendition of the final judgment therein manifest error has intervened to the prejudice of said plaintiff in error in this to wit:

1. The Supreme Court of the State of Nebraska erred in holding that Section 3031 of 1922 statutes of the State of Nebraska, as in-

terpreted by said Court to be regulatory of attorney's fees and as inhibiting the right of contract between attorney and client is not contrary to the 14th amendment of the Constitution of the United States in depriving plaintiff in error of the liberty of contract and of property without due process of law, nor abridging any privilege nor depriving him of equal protection of law.

2. That the said statute so interpreted upon legislative intention was unconstitutional in said respect and the Court erred in sustaining said statute in that particular and said decision was violative of said clauses of the 14th amendment to the Constitution in each of the following respects by depriving plaintiff in error of his liberty and privilege of contract for his labor and services and depriving him of [fols. 58 & 59] his property in such labor by legislative act and without due process of law.

3. That the Court erred in holding that said statutes did not deprive plaintiff in error of the equal protection of the law in the exercise of his right to contract under the said provision of the 14th amendment of the Constitution of the United States.

4. The Supreme Court of Nebraska erred in not holding Section 3031 of the statutes of Nebraska for 1922 unconstitutional under its interpretation of the legislative intent and the meaning of the said statutes.

Wherefore, said John O. Yeiser, plaintiff in error, prays that for the errors aforesaid and other errors appearing on the record of the said Supreme Court of the State of Nebraska in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the Supreme Court of the State of Nebraska be reversed and annulled and for such proceedings in this cause that may be determined by the Honorable Court to the end that justice may be done in the premises.

John O. Yeiser, pro se.

Dated Omaha, Nebraska, June 21, 1923.

[File endorsement omitted.]

[fol. 60] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE FROM CHIEF JUSTICE SUPREME COURT OF NEBRASKA—Filed June 21, 1923

This cause came on for decision upon appeal from the District Court of Douglas County, Nebraska, upon the complaint or citation

and return or showing of Respondent which presented the question of a construction of a Statute and the claim of plaintiff in error that the construction urged by defendant in error was in violation of the V Amendment as re-enacted in the XIV Amendment to the Constitution of the United States in depriving plaintiff of property without due process of law right in property an equal protection of law.

That these rights were originally asserted and maintained throughout the proceeding including a motion for rehearing and decided adversely to plaintiff in error upon the citation and return or showing and basing said decision solely upon a construction of the statute as one inhibiting a contract for attorney's fees which Court held to have been regulatory of attorney's fees and not in contravention of said clauses of the said Amendments to the Constitution of the United States and not deciding any question of contract or value of services. [fols. 61 & 62] Now, Therefore, it is certified that the question of whether said statute as the Supreme Court of Nebraska construed its intention of regulating charges was a violation of said XIV Amendment as adapted or the V Amendment as incorporated in the XIV Amendment for the government of the States in respect to depriving plaintiff in error of property without due process of law or depriving him of his liberty or property rights to contract for his services or depriving him of equal protection of law in exercising such rights and liberties was decided against the contention of plaintiff in error and his appeal was dismissed by said court in the final decision of said court which is the court of last resort in the State of Nebraska affirming the order that plaintiff in error be suspended from practice unless he refunded $620.00.

I further certify the constitutional questions mentioned are the only questions of law upon the pleadings and process for the decision of the Supreme Court of the United States; that the certificate was granted at the term in which the judgment in the case was finally entered.

A. M. Morrissey, Chief Justice of the Supreme Court of Nebraska.

[fol. 63 & 64] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed June 21, 1923

On this the 21st day of June A. D. 1923 came on to be heard the application of defendant for writ of error, appearing in person, and it appearing from the petition filed herein and the record filed therewith, that the application ought to be granted and that a transcript of the record and proceedings and papers upon which the judgment of the court was rendered, properly certified should be sent to the Supreme Court of the United States as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is, Therefore, ordered that the writ of error be allowed upon the plaintiff giving bond conditioned as the law directs in the sum of One Thousand Dollars, which may operate as a supersedeas and that a true copy of the record, assignment of errors and all proceedings had in the case in the Supreme Court of Nebraska shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said court may inspect the same and do what according to law should be done.

A. M. Morrissey, Chief Justice of Nebraska.

[fol. 65] Bond on Writ of Error for $1,000.00—Approved, Morrissey, J; filed June 21, 1923; omitted in printing

[fol. 66 & 67] [File endorsement omitted.]

[fols. 68 & 69] Writ of Error

United States of America, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, at the January Term, 1923, thereof, in the matter of charges against John O. Yeiser, Attorney of Douglas County Bar, vs. John O. Yeiser. Said charges made by T. B. Dysart, Frank S. Howell, Nelson T. Pratt, W. C. Fraser, R. M. Switzler a committee appointed by the Court to investigate charges, a manifest error hath happened, to the great damage of the said John O. Yeiser, Plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 19th day of July, 1923, to the end that the record and proceedi-gs aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 21 day of June 1923.

Issued at my office in the City of Lincoln, Nebraska.

Allowed by A. M. Morrissey, Chief Justice of the Supreme Court of Nebraska.

Attest: H. C. Lindsey, Clerk Supreme Court of Nebraska. (Seal Supreme Court of Nebraska.)

[fols. 70 & 71] Citation in usual form showing service on F. S. Howell, et al.—Filed July 7, 1923, and omitted in printing.

[fol. 72] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 21, 1923; July 7, 1923

To the Clerk of the Supreme Court of Nebraska:

You are hereby requested to prepare a transcript of the following parts of the record of above cause from the Supreme Court of Nebraska on Writ of Error to the Supreme Court of Nebraska.

1st. Order for attorneys to show cause on page 73 of transcript (the order of District Court from which appealed).

2d. Return of Respondent, shown — pages 74 to 102.

3d. Order of suspension unless $620 be refunded, pp. 103 to 104 transcript.

4th. Opinion and judgment.

5th. Notice for rehearing.

6th. Order overruling motion for rehearing.

John O. Yeiser, per I..

[fol. 73] SUPREME COURT,
State of Nebraska, ss:

CERTIFICATE OF LODGMENT

I, H. C. Lindsay, Clerk of said Court, do hereby certify that there was lodged with me as such Clerk, on June 21, 1923, six copies of the Writ of Error, as herein set forth—one for each defendant and one for file in my office; and that on said day there was also lodged with me the original Bond, of which a copy is herein set forth, in the case of

[Title omitted]

the same being an appeal from the district court of Douglas County.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in Lincoln, Nebraska, this July 14, 1923.

H. C. Lindsay, Clerk Supreme Court of Nebraska. (Seal of Supreme Court of Nebraska.)

[fol. 74] SUPREME COURT,
State of Nebraska:

CLERK'S CERTIFICATE

I, H. C. Lindsay, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 74, inclusive, are a full, true and complete copy and transcript of such portions of the record and proceedings in this Court in the case of

[Title omitted]

as are requested in the original præcipe herein to be prepared by me as a part of my return to the Writ of Error herein, and also of the Opinion of the Court granted herein, as the same now appear on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at my said office in Lincoln, Nebraska, this July 14, 1923.

H. C. Lindsay, Clerk Supreme Court of Nebraska. (Seal of Supreme Court of Nebraska.)

[fol. 75] UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript and copy of such parts of the record and proceedings in the within entitled case as are asked for in the præcipe filed herewith, to be made a part of my return to the Writ of Error herein, together with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the Supreme Court of Nebraska in the City of Lincoln, this July 14, 1923.

H. C. Lindsay, Clerk Supreme Court of Nebraska. (Seal of Supreme Court of Nebraska.)

Endorsed on cover: File No. 29,768. Nebraska Supreme Court. Term No. 458. John O. Yeiser, plaintiff in error, vs. T. B. Dysart, Frank S. Howell, Nelson T. Pratt, et al. Filed July 26th, 1923. File No. 29,768.

INDEX.

CASES CITED

Number 458

IN THE

SUPREME COURT

OF THE

UNITED STATES

JOHN O. YEISER, PLAINTIFF IN ERROR,

VS.

T. B. DYSART, FRANK S. HOWELL, NELSON T. PRATT, ET AL., DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR

JOHN O. YEISER, *Pro Se,*
Attorney for Plaintiff in Error.

STATEMENT

This action grew out of charges that a contract for legal services made between attorney and client was forbidden by the Workmen's Compensation Act.

Plaintiff in error contended in the court below that the statute did not pretend to interfere with the right of contract, but only made provision with respect to an attorney's lien, and that if given the broader construction, contended for in behalf of this investigation, such statute would be in violation of the 14th amendment in the particulars referred to later.

The supreme court of Nebraska held that this statute was regulatory of the fees to be charged and forbade contracting. For this reason a petition in error was filed and the writ allowed in order to test the question as to whether or not the statute referred to, as construed by the supreme court of the state of Nebraska, is contrary to the 14th amendment.

The statute referred to, being section 3031 of the Nebraska Statutes of 1922, provides as follows:

> "No claim or agreement for legal services or disbursement in support of any demand made or suit brought under the provisions of this article shall be an enforcible lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the district in which such issue arose. After such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation."

The supreme court of Nebraska held in respect to this section as follows (Trans., p. 25):

> "1. Sec. 3031, Compiled Statutes 1922, construed and held to limit the amount an attorney may lawfully charge or contract for as compensation for legal services, or disbursements, in demands or suits arising under the Workmen's Compensation Act, to such sum as may be approved in writing by the district judge.
>
> "2. An attorney cannot enforce against a claimant for compensation any claim or agreement for attorney's fees in a demand for suit brought under the provisions of the Workmen's Compensation Act, for an amount in excess of that which is approved by the district judge.
>
> "3. Section 3031, Compiled Statutes 1922, restricting the amount an attorney may charge for legal services is in cases arising under the Workmen's Compensation Act, to such sum as the district judge shall approve for the

proper exercise of the police power of the state and does not contravene the provisions of either the 5th or the 14th amendment to the federal Constitution" (Trans., p. 25).

While plaintiff in error still insists that this statute, according to its plain, grammatical interpretation, clearly shows that the legislature did not intend to regulate fees or restrict the right of contract, yet nevertheless, when the supreme court of this state gives it such a construction it is binding upon all other courts as having the construction given to it. However, if that construction makes the act contrary to the Constitution of the United States it is the duty of this court to declare the statute to be void on the ground of its unconstitutionality, not necessarily as it was originally enacted but by reason of the construction placed upon it. This act is arbitrary and confiscatory. There was no excuse of public health or other exception under police regulation.

In this case, plaintiff in error contracted for the trial of an action for wrongful death occasioned by a collision on a dark night with a street car having no headlight, together with the prosecution of the action for compensation against his employer under the Workmen's Compensation Act. The administratrix lost the street car case, but appealed it to the supreme court, where it is still pending.

Plaintiff in error collected about $3900.00 and paid over more than $3100.00, retaining only about $850.00. Of this he was given a written receipt in full and an order to pay Mr. Conoway, the other attorney, $425.00 (Trans., p. 3).

Plaintiff in error, having only $425.00 left, expended over $150.00, or nearer $250.00, for bill of exceptions, transcript, docketing, briefs, stenographers' work, railroad fare, and hotel, or all but about $150.00. He appealed this damage case and fought the compensation before the labor commis-

sioner, and then appealed that and obtained a settlement releasing her from the legal obligation of deducting the $3900.00, for the insurance company in case of recovery of the third party, the street railway company.

He fought the case against the street railway company and is still fighting it, and has only $150.00 for all of this. In the face of this condition, the Nebraska supreme court ordered him to pay back $680.00.

Two members of the committee, Mr. Pratt and Mr. Howell, reconsidered their recommendation and asked that the complaint be dismissed (Trans., pp 20–24).

The case was presented upon written charges and the return of plaintiff in error. There was no evidence, but the order was evidently made in the nature of sustaining a demurrer to this showing, which was full and complete (pp. 2–17 of Trans.).

Counsel was accused only of making a contract, a practice older than this nation, binding upon both sides. It was not a contract after the relation existed. It was not unreasonable. He is not accused of any reprehensible conduct, or of the forfeiture of the confidence of the court. He was accused of violating the terms of an unconstitutional statute impairing the right of contract and ordered to pay a sum of money several times in excess of what he received, besides losing all his services, and, in effect, ordered to work without compensation.

ERRORS OF LAW

1. The supreme court of Nebraska erred in holding section 3031 of the 1922 Statutes of Nebraska constitutional after construing said section as an inhibition against contracting for legal services because of being in contravention of the 14th amendment in each of the following respects:

a. In that plaintiff in error thereunder was deprived of his liberty of contracting without due process of law;

b. Was deprived of his property without due process of law;

c. Was deprived of equal protection of the law.

2. The supreme court of Nebraska erred in not holding section 3031 unconstitutional because of being a part of the Workman's Compensation Law, which law, being unconstitutional, includes said section 3031, as unconstitutional in the following particulars:

a. The entire act of Nebraska was intended to deprive the injured party of property in himself without due process of law and by fixing arbitrary and inadequate schedules of injury in place of the judicial inquiry of a court.

DISCUSSION OF THIS STATUTE

At this point a discussion of this statute may be appropriate to see if there be any necessity for its existence or *any condition within the exceptions* to the constitutional provision directed against or what abuse the legislature was driving at, or to see if this construction of the section of the law becomes a reasonless, arbitrary interference with liberty only upon a court decision, unfortified by any legislative intent within any exception to the constitution to accomplish any matter within its power.

On the face of this statute, questioned on this appeal, it did not appear to plaintiff in error, when he contracted, to have been arbitrary or more than a limitation of the lien for services, *but it is the construction of the supreme court of Nebraska* that makes it such.

The statute is set out again in *black face,* together with remarks after various clauses in parenthesis, as follows: (The vertical lines are not to be noticed until attention is later called to them.)

Sec. 3031. "**No claim or agreement** || **for legal services or disbursements** || **in support of any demand made or suit brought under the provisions of this article**" (this does not touch services rendered in instituting another suit under other law)—**shall be an enforcible lien** (it may be a moral lien or debt, but not enforcible as a lien)—**against the amount paid**—(this limitation is clearly directed against the money in the hands of the employer like any lien. It does not touch the money elsewhere or in the client's hands—it does not touch that debt. Besides, it is the kind of statute to be strictly construed)—**as damages or compensation** || **or be valid or binding in any other respect.** || (What is it—what is the subject? Money to be paid. That is what they are talking about. How to have a lien that is enforcible. Not one word about the money in her hands or her lawyer's hands, or her liability for service. But it is money in the debtor's hands.)—**unless** || **after such approval in writing by the judge presiding at the trial or in case of settlement without trial by the judge of the district court of the districts in which such issue arose.** || (Now, what of this approval—what for?) **After such approval if notice in writing be given the defendant for such claim, or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation.**—(It begins with lien and ends with lien.

Its constitutionality was argued below, and if given the plain grammatical meaning contended for, it would have been constitutional, but given the broader construction makes the statute unconstitutional.

In this respect we contended, and still contend:

The phrase, "valid or binding in any other respect," after the conjunction "or" is a phrase, so qualified, both before and after, by other phrases that it shows this sandwiched phrase relates only to the validity and binding effect as a lien on unpaid money in the hands of an adverse party, because that clause is the subject of the sentence. It is confined to validity "in any respect" concerning the sense of its being subjected to a lien. This phrase does not appear in such a way as to relate to any

contract between the attorney and client which is not mentioned but only to effecting a lien.

This money plaintiff in error collected was in the hands of the adverse party. It was paid over, reported to his client, and settled by her voluntary agreement as to the amount to be retained. There was no dispute between the client and plaintiff in error over the settlement. She ordered an appeal of the other case and she executed a receipt reflecting a settlement as stated in said receipt (Tran. 13).

The phrase, "valid and binding in any other respect," following the conjunction "or," clearly shows this phrase was not an attempt to legislate on a new matter of broader scope than all the rest of the entire section. The phrase used after the word "or" was therefore a phrase qualifying or defining the next nearest particular complete or rounded out antecedent phrase which it follows. Not all phrases that preceded that one, but only the last one. Thus the legislature had said and was speaking first and remotely of a claim or agreement not to stop there as a subject of legislation but that phrase was used as mere structure to reach a different thought. It was not intended to legislate about all claims or all agreements of every kind between everybody. But in the next phrase we see they mean to exclude all other claims but those for legal services. Neither was this language used to affect *all* agreements for *legal services,* but only those in "support" of some demand or suit, as shown by the successive phrases used.

Under the provision of this article plaintiff in error has divided the more independent phrases of this statute (ante, p. 6) by two vertical lines, and the qualifying phrases of qualifying phrases by one vertical line.

Now, what is this singling out of a narrow class of claims about? It says no such claims shall—shall what? The next clause of this section shows the object to be that it shall not

be an enforcible lien against *the amount to be paid.* Now, is there still another qualifying phrase following this objective phrase? Let us see as we go back again and review the sentence down to and including answering the last question.

The first qualifying phrase following the first structural phrase greatly narrows the general claim down to a particular claim for legal services and then qualifies it to mean only when this claim is "in support of any demand or suit brought under this act." It is a very different thing than "any" suit and much less any contract. This phrase is then still further qualified, by a further phrase, that it shall not be "an enforcible lien against the amount to be paid as damages or compensation," *unless certain things are done.* So it narrows and narrows down to a very limited and particular kind of a claim as the subject of action—it is a claim to be used as the basis of a lien, on money to be paid—money in the other party's hands. Stripped down, subject to its lastly defined status, relates only to a lien (contingent on an order and notice), and a description of what the lien is on, is the real antecedent phrase, to which the phrase following the conjunction relates. It means, "or that this lien, about which we are talking, *shall not be binding in any other respect.*" It means that this lien shall be binding and valid only in the respect defined therein, and not under any general lien law or in no other way. It does not relate generally to remote agreements of all kinds, because general agreements, general claims or general contracts were never included nor contemplated from the language used. General claims may be suggested to the imagination, at the inception by the first word or two used in building the real situation for reason to grasp, but a very narrow claim against a particular fund was the final creation of this language—and the legislature said of it concerning this lien on this fund and of nothing else, that it should be valid or binding in no "other" respect than therein mentioned. This is all because it was a qualification upon the

last antecedent phrase. That has sense and would have made the section constitutional, while the other construction is clumsy, unreasonable, ungrammatical, and unconstitutional. Following this the qualifying phrase is itself qualified by a phrase that makes a lien valid in some respects because it says *"unless* the same be approved in writing," etc. The last seven lines provide how one may obtain this lien, viz., by approval of the court and notice.

In the case of *Nebr. St. Ry. Commission* v. *Alfalfa Butter Co.*, 178 N. W. 766, the court says:

> * * * "One canon of construction, known as the doctrine of the 'last antecedent clause,' is that relative to the words or phrases immediately preceding, and as not extending to or including other words, phrases, or clauses more remote, unless such extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act. In the application of that rule, there is a strict analogy to the case before us in the following decisions: *City of Traverse City* v. *Township of Blair,* 190 Mich. 313, 147 N. W. 81; *Dagan* v. *State,* 162 Wis. 353, 156 N. W. 153; *State* v. *Schaffer,* 95 Minn. 311, 104 N. W. 139; *Zwietusch* v. *Village of East Milwaukee,* 161 Wis. 519, 554 N. W. 981; *Summerman* v. *Knowles,* 33 N. J. Law 202; 36 Cyc. 1123."

In *State* v. *Schaffer,* 104 N. W. 139, the charter authorized a city to regulate—

> "shows of all kinds, * * * circuses, concerts, * * * places of amusements and museums *for which money is charged for entrance into the same,"*

It was held the phrase italicised qualified only "museums."

In *State* v. *Cent. Brewing Co.,* 179 Pac. 296, the rule of last antecedent was laid down with equal force, but adding that unless the statute itself—

> "requires a different construction, the rule of the last antecedent is applicable as fairly indicating the true purpose and intent of the lawmakers."

In *Bowes et al.* v. *Baumert,* 253 Fed. 627, it was held:

> "Gramatically as well as because the whole act relates to merchant seamen 'those' in act * * * providing, that in any suit to recover for injury sustained on board a vessel, seaman having a command shall not be deemed to be fellow-servants with 'those' under their authority, refers, not to person injured and so not to a longshoreman, employed by ship in loading, but to seamen."

The context of this Nebraska act was a regulation of liens and this phrase in question must be held to have been an amplification of the definition of a lien on money to be paid, or how to secure it, just as in the last case the word "those" referred to seamen and not generally to fellow-laborers, because the law was about seamen. The Nebraska act was about liens.

There are other strong cases on this point, but only one more will be given.

In *Puget Sound Electric Ry. et al.* v. *Benson,* 253 Fed. 710:

> * * * "The ordinance provides:
>
> "The following vehicles in the order named, shall have the right of way in the use of all streets and public places, viz., apparatus of the fire department, police patrol wagons, ambulances responding to emergency calls, emergency repair wagons of the street railway companies, and U. S. mail wagons.
>
> "The question involved is one of construction. It is insisted that the words 'responding to emergency calls' qualify the phrase 'apparatus of the fire department,' as well as 'ambulances,' and therefore that it is only when the apparatus of the fire department is responding to an emergency call that it is accorded the right of way under the ordinance.
>
> "The application of one of the simplest canons of statutory construction, namely, that a 'limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction.' * * * The last antecedent is 'ambulances,' and under this rule the quali-

fying clause refers thereto, and not to the antecedents preceding that. Nor does the subject-matter require a different construction." • • •

The sense or intention shown in the Nebraska act is exactly for what we contend as shown by what follows in the section questioned. What follows the phrase, "or be valid or binding in any other respect," shows the legislative intent is confined to liens. The statement is that *after the approval of the judge* is obtained, "the same *shall be a lien,*" "if notice in writing be given the defendant."

The law itself originally did not provide an attorney's fee taxable against the employer or his insurer in any sum whatsoever as recently decided by the supreme court, but it is only a provision on how to preserve a lien.

Under our law an employee is not denied services of an attorney. He is expected to use a lawyer. He may be represented, but there was no provision to make the *employer* pay. How is the lawyer to be paid? It is left for usual contractual determination between the attorney and his client—with the attorney being *restricted in his lien rights* of securing all or some part only from his client's adversary where money is still in the hands of the defendant.

In *Abel Const. Co. et al.* v. *Goodman*, (Neb.) 181 N. W. 713:

• • • "The court also held that defendant was entitled to recover $414.00 for statutory waiting time, making a sum total of $1326.00 and costs, for which, on October 23, 1920, judgment was rendered. In addition thereto the court taxed an attorney's fee of $200.00 as costs. Plaintiff contends that the court erred in permitting defendant to recover either *for an attorney's fee or for statutory 'waiting time.'* From the judgment plaintiff appealed to this court." • • •

• • • "With respect to the taxation of an attorney's fee as costs the judgment is reversed. In all else the

judgment is affirmed, except that as to the statutory waiting time penalty it is ordered that the district court modify its judgment so that the total amount of defendant's recovery for waiting time shall be the sum of $6.00 a week for 75 weeks." * * *

The subject was passed upon again in construing an entirely new provision enacted by the legislature in 1919, holding an attorney's fee may be taxed against the employer *as a matter of costs* in favor *of the plaintiff*—not mentioning plaintiff's attorney. This law does not pretend to regulate the contract between attorney and client—is silent on the subject—it is spoken of as a mere item of costs chargeable by the court to the adverse party, and made recoverable by the plaintiff. The case referred to is *Western Newspaper Union* v. *Dee,* 187 N. W. 919. In this respect it is as follows:

"Was an attorney's fee properly allowed? The answer depends on the terms of the statute. In 1919 the act was amended and now contains the following provisions:

"'Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award, the appellate court shall in like manner allow the *plaintiff* a reasonable sum as attorney's fees for the appellate proceedings.' Rev. St. 1913, No. 3666; Laws 1919, c. 91.

"From the compensation commissioner plaintiff appealed without reducing the award. An attorney's fee, therefore, was properly taxed in the district court and the amount allowed does not seem to be unreasonable."

This allowance, taxed as costs, falls in the same class as those equity cases where the $20.00 counsel fee of federal court is allowed—it is a mere cost allowance to the party and not a regulation of contract between the attorney and client.

Plaintiff in error cites a case next hereinafter in which the law and facts are almost identical with this case, excepting the lawyer in that case did not invoke his constitutional rights mentioned twice by the court seemingly to criticise the lawyer for waiving it.

Kratz v. *Holland Inn et al.*, 178 N. W. 292.
Schilling v. *Ind. Accident Co.*, 190 Pac. 373.

As recognized the supreme court cannot be reversed upon its construction, even though it may be erroneous, yet when that construction makes the statute unconstitutional our recourse is to assail the statute which the court below made to be an arbitrary interference with the liberty of contract.

Now, was it arbitrary?

It cannot be that hundreds of thousands of contracts entered into every year in the ordinary relation of attorney and client are subject to price fixing legislation under pretended police power—or in the class with usury, which grew out of unlawful trafficking in money since Bible days. Neither is it in the class with child labor contracts in restraint of trade, nor carrier contracts, where the public is at the mercy of the carrier—nor hackmen, nor any other known exception.

They are not within the reasoning of a single exception to the general rule of liberty of contract guaranteed by the constitution.

If an attorney's right to contract his labor in ordinary and usual litigation be forbidden, so can a farmer's, or a fiddler's, or a painter's labor be proscribed and no class of old and honorable service be exempt, but that section of the constitution be the same as not written. The exception would become the rule and then the rule would vanish. But the supreme court of the United States has told us where this advance upon exceptions shall stop.

ARGUMENT UPON ITS UNCONSTITUTIONALITY

The supreme court holdings on such infringements are both new and of long standing.

In *Adkins et al.* v. *Childs Hospital et al.*, 67 L. Ed. 260, this court held:

> "The question presented for determination by these appeals is the constitutionality of the act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. • • • That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court, and is no longer open to question. • • • Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.
>
> "In *Adair* v. *United States*, 208 U. S. 174, 175, 52 L. Ed. 442, 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, Mr. Justice Harlan, speaking for the court, said:
>
> " 'The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. • • • In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free hand.'

(The court, however, mentions the following exceptions):

> • • • "(1) Those dealing with statutes fixing rates and charges to be exacted by business impressed with a public interest. • • •
>
> "(2) Statutes relating to contracts for the performance of public work. • • •
>
> "(3) Statutes prescribing the character, methods, and time for payment of wages. • • •

"(4) **Statutes fixing hours of labor.** It is upon this class that the greatest emphasis is laid in argument, and therefore, and because such cases approach most nearly the line of principle applicable to the statute here involved, we shall consider them more at length. In some instances the statute limited the hours of labor for men in certain occupations, and in others it was confined in its application to women. No statute has thus far been brought to the attention of this court which, by its terms, applied to all occupations. In *Holden* v. *Hardy,* 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383, the court considered an act of the Utah legislature, restricting the hours of labor in mines and smelters. This statute was sustained as a legitimate exercise of the police power, on the ground that the legislature had determined that these particular employments, when too long pursued, were injurious to the health of the employees, and that, as there were reasonable grounds for supporting this determination on the part of the legislature, its decision in that respect was beyond the reviewing power of the federal courts.

* * * "Mr. Justice Peckham, speaking for the court (p. 56), said:

"'It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraint.'

"And again (pp. 57, 58):

"'It is a question of which two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does

not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his labor.'

"Coming, then, directly to the statute (p. 58), the court said:

" 'We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the federal Constitution, there would seem to be no length to which legislation of this nature might not go.'

"And, after pointing out the unreasonable range to which the principle of the statute might be extended, the court said (p. 60):

" 'It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust; and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature.'

"And further (p. 61):

" 'Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor

to earn their living, are mere meddlesome interferences with the rights of the individual * * * whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed.'

"Subsequent cases in this court have been distinguished from that decision, but the principles therein stated have never been disapproved.

"The same principle was applied in the rent cases (*Block* v. *Hirsh*, 256 U. S. 135, 64 L. Ed. 865, 16 R. L. A. 165, 41 Sup. Ct. Rep. 459, and *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170, 65 L. Ed. 877, 41 Sup. Ct. Rep. 465), where this court sustained the legislative power to fix rents as between landlord and tenant upon the ground that the operation of the statutes was temporary, to tide over an emergency, and that the circumstances were such as to clothe 'the letting of buildings * * * with a public interest so great as to justify regulation by law.' The court said (p. 157):

" 'The regulation is put and justified only as a temporary measure (citing *Wilson* v. *New, supra*). A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.'

* * * "In the Muller case the validity of an Oregon statute forbidding the employment of any female in certain industries more than ten hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. The cases of Riley, Miller, and Bosley follow in this respect the Muller case. But the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller case (p. 421), has continued 'with diminishing intensity.' In view of the great —not to say revolutionary—changes which have taken

place since that utterance, in the contractual, political, and civil status of women, culminating in the 19th amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.

* * * "The essential characteristics of the statute now under consideration, which differentiate it from the laws fixing hours of labor, will be made to appear as we proceed. It is sufficient now to point out that the latter, as well as the statutes mentioned under paragraph (3), deal with incidents of the employment having no necessary effect upon the heart of the contract; that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages. Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. The court has been careful in every case where the question has been raised to place its decision upon this limited authority of the legislature to regulate hours of labor, and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages.

"If, now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest or public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods, or periods of wage payments. It does not prescribe hours of labor on conditions under which labor is to be done. It is not for the protection of persons under legal disability, or for the prevention of fraud. It is

simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequences may be to oblige one to surrender a desirable engagement, and other to dispense with the services of a desirable employee.

• • • "The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss.

• • • "The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the 5th amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wages will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite directions. A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other."

In *Wolff Packing Company* v. *Court of Industrial Relations*, 67 L. Ed. 1922, p. 1107, this court held:

"The necessary postulate of the industrial court act is that the state, representing the people, is so much interested in their peace, health, and comfort that it may compel those engaged in the manufacture of food and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment of terms fixed by an agency of the state, if they cannot agree. Under the construction adopted by the state supreme court the act gives the industrial court authority to permit the owner or employer to go out of business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege, under the circumstances, is generally illusory. *Block* v. *Hirsh*, 256 U. S. 135, 157, 65 L. Ed. 865, 871, 16 A. L. R. 165, 41 Sup. Ct. Rep. 458. A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit, or combine with others to induce them to quit.

"The qualifications do not change the essence of the act. It curtails the right of the employer, on the one hand, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the 14th amendment. *Myer* v. *Nebraska*, decided June 4, 1923 (262 U. S. 390 ante, 1042 — A. L. R. —, 43 Sup. Ct. Rep. 625). While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins* v. *Children's Hospital*, decided April 9, 1923 (261 U. S. 525 ante, 785, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 384).

* * * "Business said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers, and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. *State* v. *Edwards,* 85 Me. 102, 25 L. R. A. 504, 41 Am. St. Rep. 528, 29 Atl. 947; *Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252, 254, 60 L. Ed. 984, 986, P. U. R. 1916D, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765.

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly.

* * * "It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, but the expression, 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of

an affirmative obligation on their part to be reasonable in dealing with the public.

"It is urged upon us that the declaration of the legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the court, and that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise. To this point counsel for the state cite. * * * These cases are not especially helpful in determining how a business must be devoted to a public use to clothe it with a public interest so as to permit regulation of rates or prices.

* * * "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

"An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes (*United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 320, 41 L. Ed. 1007, 1020, 17 Sup. Ct. Rep. 540; *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252, 256, 60 L. Ed. 984, 987, P. U. R. 1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765); and while this feature does not necessarily exclude businesses from the class clothed with a public interest (*German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 57 L. Ed. 1011, L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612), it usually distinguishes private from *quasi* public occupations.

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

"In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product, and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are countrywide, a short supply is not likely, and the danger from local monopolistic control less than ever.

* * * "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. * * * The regulation of rates to avoid monopoly is one thing. The regulation of wages is another.

* * * "If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public-interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. Civil Rights cases, 109 U. S. 3, 24, 27 L. Ed. 835, 843, 3 Sup. Ct. Rep. 18. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the 14th amendment.

• • • "We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the 14th amendment, and deprives it of its property and liberty of contract without due process of law." • • •

"In *Coppage* v. *United States, supra,* (p. 14), this court, speaking through Mr. Justice Pitney, said:

" 'Include in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

" 'And interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it *be supportable as a reasonable exercise of the police power of the state.*'

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is nevertheless the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the ground upon which they rest. • • • (Exceptions quoted at page 15.)

"In *Bunting* v. *Oregon,* 243 U. S. 426, a state statute forbidding the employment of any person in any mill, factory, or manufacturing establishment more than ten hours in any one day, and providing payment for over-

time. * * * The law was attacked on the ground that it constituted an attempt to *fix wages*, but that contention was rejected and the law sustained as a reasonable regulation *of hours of service*.

"*Wilson* v. *New*, 243 U. S. 332, involved the validity of the so-called Adamson law. * * * The act was sustained primarily upon the ground that it was a regulation of a business charged with a public interest. The court, speaking through the chief justice, pointed out that regarding 'the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers, and employees, to agree as to a standard of wages free from legislative interference,' but that this did not affect the power to deal with the matter with a view to protect the public right, and then said (p. 353):

"'And this emphasized that there is no question here of purely private right since the law is concerned only with those who are engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated.' * * * The act was not only temporary in this respect but it was passed to meet a sudden and great emergency. This feature of the law was sustained principally because the parties, for the time being, could not or would not agree. Here they are forbidden to agree.

"The same principle was applied in the rent cases (*Block* v. *Hirsh*, 256 U. S. 135, and *Marcus Brown Holding Company* v. *Feldman*, 256 U. S. 170), where this court sustained the legislative power to fix rents as between landlord and tenant upon the ground that the operation of the statutes was temporary to tide over an emergency and that the circumstances were such as to clothe 'the letting of buildings * * * with a public interest so great as to justify regulation by law.' The court said (p. 157):

"'The regulation is put and justified only as a temporary measure (citing *Wilson* v. *New*, *supra*). A limit

in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change. * * *

"It follows by what has been said that the act in question passes the limit prescribed by the constitution, and, accordingly, the decrees of the court below are affirmed."

In the case of *Burns Baking Company* v. *Bryan,* supreme court advance opinions, volume 68, page 459, the court says:

"Plaintiffs in error do not question the power of the state to enact and enforce laws calculated to prevent the sale of loaves of bread of less than the purported weight; but they contend that the provision fixing the maximum weights in this statute is unnecessary, unreasonable, and arbitrary. * * * For the reasons stated, we conclude that the provision that the average weights shall not exceed the maximums fixed is not necessary for the protection of purchasers against imposition and fraud by short weights, and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially *unreasonable* and *arbitrary,* and is therefore repugnant to the 14th amendment."

This court said in *Myer* v. *State,* 67 L. Ed. 1042:

"The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the 14th amendment. 'No state * * * shall deprive any person of life, liberty, or property without due process of law.'

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely a freedom from bodily restraint, but also the right of the *individual to contract, to engage in any of the common occupations of life.* * * * *No emergency* has arisen which *renders knowledge by a child* of some language other than English *so clearly harmful as to justify its inhibition,* with the consequent infringement of rights long freely enjoyed. We are constrained

to conclude that the statute as applied is *arbitrary, and without reasonable relation to any end* within the competence of the state."

This court also said in *Prudential Insurance Company* v. *Cheek,* 66 L Ed. 1044:

"That freedom is the making of contracts of *personal* employment, by which labor and other services are exchanged for money or other forms of property, as an elementary part of the rights of personal liberty and private property, not to be struck down directly, or arbitrarily interfered with, consistently with the due process of law guaranteed by the 14th amendment, we are not disposed to question. This court has affirmed the principle in recent cases. *Adair* v. *United States,* 208 U. S. 161, 174, 52 L. Ann. Cas. 764; *Coppage* v. *Kansas,* 236 U. S. 1, 14, 59 L. Ed. 441, 446, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240.

"But the right to conduct business in *the form of a corporation,* and, as such, to enter into relations of employment with individuals, is not a *natural or fundamental right.* It is a creature of the law; and a state, in authorizing its own corporations or those of other states to carry on business and employ men within its borders, may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient, in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact. * * * It does not prevent the corporation from employing whom it pleases on *any terms that may be agreed upon.* So far as construed and applied in this case it does not debar a corporation from dismissing an employee without cause, if such would be its right otherwise, nor from stating that he is dismissed without cause, if such be the fact. It does not require that it give a commendatory letter. There is nothing to interfere, even indirectly, with the *liberty* of the corporation in dealing with its employee, beyond giving him, instead of what formerly was called a "reference' or 'character,' a brief statement of his service with the company according to the truth—a word of introduction, to be his credentials where otherwise the oppor-

tunity of future employment easily might be debarred or impeded. * * * *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, dealt with a statute concededly valid if enacted in the interest of the public health, and held it void on the ground that in truth it was not, within the fair meaning of the term, a health law, but was an illegal interference with the right of individuals to make contracts upon such terms as they might deem best.

* * * "In the latter case there was a direct interference with freedom in the making of contracts of employment *not asserted to have relation to the public health, safety, morals, or general welfare beyond a purpose to favor the employee at the expense of the employer*, and to build up the labor organizations, which we held was not properly an exercise of the police power."

In *Leep* v. *Iron Mountain & So. Ry. Co.*, 84 Ark. 407, petition in error dismissed by supreme court as reported in 40 L. Ed. 142, the opinion of the state court covered the question of rights and exceptions, saying:

"We have thus far spoken of the limitations that can be imposed on the right to contract. We have seen that the power of the legislature to do so is based in every case on some condition, and not on the absolute right to control. We think it is obvious that the right to contract cannot be limited by arbitrary legislation which rests on no reason upon which it can be defended; for, if it could, the right would cease to exist, and become a license revocable at the will of the legislature, and the government would become a despotism in theory, if not in fact. Such a power cannot exist, for, if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness, declared to be inalienable by the constitution of this state.

"When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose

of prohibiting the contract or controlling the terms thereof. In *State* v. *Goodwill,* 33 W. Va. 179, the supreme court * * * said: 'The property which every man has is his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hand; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and as incident to this is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell, or convey property of any kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery, between liberty and oppression."

The supreme court of the United States has very clearly distinguished the class of cases where contractual rights regarding labor or service in the ordinary sense from those fixing charges in the gratuitous bounty distribution of pensions. The quotation from the following case, while sustaining the right to regulate attorneys' fees in such cases as pension matters, *draws a line between such regulation of fees on governmental gifts as distinguished from services on litigating legal contests on matters of dispute so long recognized as legitimate business.*

In *Frisbie* v. *United States,* 157 U. S. 160, the court said:

"While it may be conceded that generally speaking, among inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligation, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is *against public policy.* The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.

"*The pension granted by the government is a matter of bounty.* 'No pensioner has *a vested legal right* to his pension. Pensions *are the bounties of the government,* which congress has the right to give, withhold, distribute, or recall, at its discretion.' *Walton* v. *Cotton,* 60 U. S. 19, How 355 (15658); *United States* v. *Teller,* 107 U. S. 64, 68 (27:352, 354).

"Congress being *at liberty to give or withhold pensions,* may prescribe who shall receive, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a *legal right* to a pension, and no man has a *legal right to interfere* in the matter of obtaining pensions for himself or others. The *whole* control of that matter is within the domain of congressional power. *United States* v. *Hall,* 98 U. S. 353 (25:180). Having *power* to legislate on this *whole matter,* to prescribe the conditions under which parties may assist in procuring pensions, it has the equal power to enforce by penal provisions compliance with its requirements. There can be no *reasonable* question of the constitutionality of this statute." * * *

Had the client of plaintiff in error no right to hire lawyers to sue a third party for the death of her son? Had she no right to hire lawyers to appeal the other case? Could she

not use the sum received to hire lawyers as well as to buy a lot of a real estate agent, or a coat from a furrier? Had a lawyer no right to contract his services in such common litigation as to sue for a tort on a plain cause of action for wrongful death? Could not this be joined in a contract for services in enforcing compensation?

Is it possible that a person who *contracts* to accept the provisions of the compensation act to settle choses in action in advance through his silence, or failure to reject an option, cannot use the money he obtains as his property in settlement of damages sustained to engage a lawyer to recover full compensation in other litigation? Can it be said the right of an attorney and client to contract in general litigation to recover for losses sustained stands upon such flimsy ground? The baker's right to fix his own charges, or price, after health regulation is complied with, cannot be said to be under any greater protection from the constitution than a lawyer's right to bargain for services in recovering a property right accruing as a result of a wrong done, or to recover money due on a mortgage, or to recover property by replevin. *But the real matter in hand is that our legislature, I believe, never undertook to regulate the charges between attorney and client, but only made provision for a fee to be taxed in favor of plaintiff and against defendant as an item of costs, placing, however, restriction upon the lien on the money to be paid or the money while in the other party's hands.* The supreme court of Nebraska, however, widened its scope.

Back of it all, plaintiff in error has been reasonable and fair and just, and when he paid to his associate half of the money received it was under a written order from his client; he went on with the appeal of the case against the street railway company at considerable expense (the case is now in the Nebraska supreme court), and yet plaintiff in error is ordered to pay it all back, including the half of the fee which he paid his associate. He would lose his labor and all fruits

of his work, and pay several hundred dollars for the "privilege" of doing this work.

If plaintiff in error should do any serious wrong he will never object to punishment, or censure, but he does feel this proceeding was a very great and expensive injustice violative of his constitutional rights.

It is perfectly clear that this is not a bounty case. The fund is no sense a gift, but a contractual settlement of a chose in action surrendered as a consideration of this policy provision of scheduled insurance.

She had a right to buy a lawyer's services and he had a right to agree upon compensation for this service alone or in conjunction with other service.

Study and learning in law is just as old and as honorable, and requires as much care and knowledge as is required in making bread. In the supreme court of Nebraska in the case of *Jay Burns Baking Company* v. *Nebraska,* 189 N. W. 383, it is said in sustaining a law fixing the weight in bread, that the act "does not fix prices, but leaves the baker free to make reasonable charges." The lawyer, or civil engineer, or chemist, or millwright, or glassblower, under our constitution, has the right of bargaining and jury trial to determine controverted questions upon such contracts. Punishments and judgments may always be invoked, but the arbitrary fixing of compensation is not a legislative function.

The whole Workman's Compensation Act is a violation of the due "process of law" clause of the 14th Amendment.

This was asserted in the showing made (p. 2, Trans.).

At the time plaintiff in error was retained he had a case pending in court invoking this question, the preparation of which caused a serious doubt as to the constitutionality of the entire act, and he expected to prevail. Since then that

case was decided adversely by the Nebraska court and our client could not afford to appeal to this court. But to show good faith in martialing this case in the order taken an abstract of the argument in that case wherein the constitutionality of the entire Woman's Compensation Act was challenged is appended hereto. If this contention was right, and the entire law be unconstitutional, then the proceeding against plaintiff in error is void because the section asserted against plaintiff in error would be unconstitutional, *i. e.* if the whole act is unconstitutional, then this section is unconstitutional. In view of the fact that one section is invoked against plaintiff in error, he should be given the right to challenge it all if that challenge is beneficial to his defense, and the challenge of all be necessary to reach that one included section.

Plaintiff in error offers an abstract of this argument presented to the Nebraska supreme court as an appendix hereto because it may be regarded by the court as too distant from the more definite challenge to the particular section, and such a separate presentation may be helpful.

It is respectfully submitted that the decision of the supreme court of Nebraska should be reversed.

JOHN O. YEISER,
Plaintiff in Error.

APPENDIX

Act Unconstitutional

From brief in *McGowan* v. *Athletic Club* case, No. 21,249:

(b) If the exceptions in this law do not include plaintiff in such capacity, we most earnestly urge a second time before this court *that the Workman's Compensation Law is unconstitutional in so far as it destroys any common law remedy for a personal injury to a living person damaged to a greater extent than said Workman's Compensation Act in fact does compensate.*

This is a matter of such supreme importance that I feel that I must approach the subject with unusual gravity or unusual something to stop the psychological train of thinking gathered up by hurrah to sweep the courts off their feet on the assumption that every question has been irrevocably settled and settled right.

I want to call the court's attention to the "atmosphere"—as the literary critic would say—the situation of things, and then come right down to decisions and the philosophy of these decisions.

The court will remember the great publicity of unfair and misleading newspaper work and spectacular moving picture propaganda on this law as a sort of philanthropy for the working man. Every reference and description was an artificial lie about aiding the working man when the plan and scheme is to beat him. Individually the members of the bench know it and the deluded victims as a class now know it and are conscious that some of their own leaders were induced to mislead them. This piece of legislation is but one of many steps taken by the small class of privilege from the foundation of the great monument of public opinion that cannot remain fixed and secure without resting upon a firm foundation of justice. Where our courts follow a law it is not like

the children of Israel were expected to follow the Ark of the Covenant, but we have an instrument whereby we test its authenticity. The constitution exposes the germs of bad law as reliably as the Wasserman test will show corruption in the blood. The parasites of such a law may be expected when you see enemies of our freedom and of justice hovering about its incubation.

Shall the court allow this legislative confiscation of the most sacred property man owns in this world—property in himself? Shall the employers be held not liable for his great damage to one man, whom by his negligence he injures, that he may give little charaities to others who are injured by their own negligence?

If you know this practice is bad and will run to worse and that in fact it is contrary to the constitution, why apologize for it by citing decisions of outside courts filled with what plainly read and understood is sophistry. The greatest answer any man may receive is more silent and more reliable than the broad wireless system, because every man feels through little throbs in his heart that anything he contemplates is either right or wrong. You know as you read these lines that this law is either right or wrong—that the vast army of laboring men have been either helped or hurt. You don't have to read its bad results in a bill of exceptions, because you see it by reading the law and deducing the effects and weighing them with the great unquenchable public knowledge. When you read long struggling opinions from the courts of other states endeavoring to argue around a short, clear, constitutional inhibition, such opinions cease to stand as authority. No decision of any sister state has any binding force upon our courts as law other than a conviction of justice, which the reason therein conveys. Many times courts follow dissenting opinion, instead of majority opinions of other states, because of the fact that reason, instead of words, reign supreme in such consideration.

We contend the law, so far as it affects a man who has suffered the loss of an adequate remedy affording him complete and full compensation for loss and damages to his person or property, which remedy he inherently had, is confiscatory and in violation of the 14th amendment to the Constitution of the United States and the constitution of our state in these particulars: It takes his property "without compensation," "without due process of law"; it substitutes an insurance policy and an arbitrary, and unjust schedule of losses for a verdict in a court of law and the personal inquiry guaranteed by our constitution.

Now, let us compare this law with other laws attempting the violation and confiscation of human rights. Read the opinions of courts who fearlessly branded similar attempts as void.

In the case of *Hansan* v. *Krehbiel,* 68 Kan. 670, the court held newspaper retraction is no remedy for damages by libel, and that the law substituting retraction for action was unconstitutional.

How could an arbitrary schedule of losses for fingers or arms take the place of orderly inquiry and effort at actual compensation?

In *Parks* v. *Detroit Free Press Company,* 72 Mich. 560, the court took the same position as in the previous case.

May it not be that our courts will permit such as Nebraska manhood and womanhood to suffer the loss of legs or arms by wrongful act and to give up the remedy for full compensation and be given in lieu newspaper praise of losses paid to other men. This destruction of a chose in action for loss of property is denying due process of law for full compensation —compensation which the courts hold is not compensation unless full, adequate, and complete.

In *McGee* v. *Baumgartner,* 121 Mich. 287, the court held that right to recover in action of libel for damages to reputation cannot be abridged by statute, and followed *Parks* v. *Free Press Company.*

See also:

Batdorff v. *Oregon City,* 53 Ore. 402.
Terrill v. *Rankin,* 2 Bush (Ky.) 453.

The unconstitutionality of some compensation acts have been before the courts, but they have been passed upon largely at the behest of employers who have claimed *the taking of little premiums* to support the law *was confiscatory.* In these cases the courts have held these premiums were so small in comparison with the great good to the employer that it was not confiscation, but a mere tax as for license *for a greater privilege.*

Even if it be a minor tax for the employer, it is not a minor matter to authorize taking $25,000.00 damages away from one man who suffers because of the employer's negligence, that he (the employer) may pay fifty men for bruises occasioned by their own negligence. The act of abolishing a legitimate common law chose in action is the taking of property. Is the measly remedy afforded him adequate compensation for the man who loses two legs?

We challenge counsel to cite any case, logically reasoned, where a man was injured to the extent of ten or twenty thousand dollars by gross negligence occasioning the loss of arms and legs, which are his property—most sacred property—being called upon to give this property up and surrender his loss and damages and cause of action for the good of the cause and take a schedule of 50 per cent of his wages for 200 weeks, under our constitution. Apply the reasoning of the newspaper anti-libel laws to these Workmen's Confiscation Laws and the only rational conclusion is both are confiscatory.

The pioneer cases from sister states who went wrong are full of talk and false reasoning of pretended aid for the poor laboring man—and to discredit an honorable profession and the very bulwork of courts—the bar.

It is unconstitutional and shameful to legislate our courts out of business and turn justice over to insurance companies who, in fact, are a set of legalized gamblers. You bet with them you get hurt, and they bet you don't. It is a chance game in every policy they write, and losses are so disastrous sometimes that originally insurance companies have been charted to write such policies to enable men to distribute their losses.

Now, we are not fighting insurance companies for the purposes they were originally chartered, but we are uncompromising foes of putting the courts out of business to the extent of substituting these corporations for courts.

If the substitution be sustained for employers we will see the day when the payment of all debts are insured, and when a man fails the creditor cannot sue in a court of law, but the insurance company will pay a policy of some per cent of the debt; we will see the day when wages will be insured and you take a scheduled compensation and have no remedy in courts —there will be no limit to court encroachment—if we but use a little imagination. Gambling will take the name of justice.

But as long as our constitution stands I do not think the courts will suffer their authority, so jealousy guarded by the constitution, to be encroached upon by such legislative acts.

All talk about contract or agreeing to be bound by the law, because not disclaimed, is a rape of rights—and rank coercion. It is like asking a man if he has quit beating his wife; if he says "yes" he admits he did do it; if he says "no" he admits he is still doing it. You can't dodge this law's confiscatory provisions or its "without due process of law"

violations by any answer. Instead of open-face justice it is the damndest of tricks. It is equal to the trial for witchcraft when the accused were thrown in the river, and if they swam out they were guilty. If they drowned they were not witches, but innocent. Oh, what wisdom and philosophy as an excuse to beat the constitution by contract! The reasoning is like that of the thief who stole the jewel from a statue of the virgin and claimed she gave it to him, testifying he asked her for it and as she said nothing it meant yes, because, under the law silence is consent.

This silence, provided by law for millions of workers, construed as consent—this theory to dodge the constitution—is a danger to democracy that we will not silently consent to accept without one last eternal death struggling protest.

It is not necessary to quote the honorable and ancient literature that has stood the test of time, but never in practice of law has it seemed more fitting than it is today and during these troublous times to offer wisdom as an armor and sword in behalf of the people, and as a testimonial against accepting decisions of other states just because courts rendered them. Courts are not free from error—never have been—as the following shows:

> "Execute true judgment and show mercy and compassion every man to his brother. Oppress not the widow nor the fatherless, the stranger nor the poor. * * * *Execute the judgment of truth and peace in your gates; and love no false oath; for all these I hate, said the Lord.*
>
> *"Let those who have power rule in righteousness, and Princes in judgment. And let him that is a judge be as an hiding place from the wind, and a covert from the tempest; as rivers of water in a dry place; as the shadow of a great rock in a weary land. Then the vile person shall no more be called liberal; nor the churl bountiful; and the work of justice shall be peace; and the effect of justice, quiet and security; and wisdom and knowledge shall be the stability of the times. Walk ye righteously*

and speak uprightly; despise the gain of oppression, shake from your hands the contamination of bribes; stop not your eyes that you may not see the crimes of the great.."

Shall the organizers of these miniature bounties handed out with one hand and boundless grafts taken with the other hand—these vile people—be called liberal? Will the courts of sister states continue to praise this gang of robbers—these insurance usurpers of courts—that class of men who when asking legislation look upon the constitution as a scrap of paper?

Under the protecting shadow of that Holy Book of sacred history so truly pointing out the weakness of human institutions and in the command of the fundamental constitutional law of this land, which forbids taking private property even for the public good without full compensation, will you dare to call the insurance magnate *liberal* or the recipient of these questionable legislative favors *bountiful?*

Have you, the supreme judges of our beloved state, deadened your ears to the cries of anguish from our mangled and crippled brothers or are you blind against the burning shame of this unconstitutional act? No! No state in this Union possesses a judiciary of equal independence. This is said, not because I know the members of the court but because I know the whole state behind them.

You may spurn this argument and ignore it with a gloomy silence, or you may cast it aside with a shaft of levity, but down deep in your hearts you see the truth, you know this thing has already gone too far in other states. Too many favors have passed sleeping sentinels. There must be, there will be, a turning point in this terrible travesty. The turn will be made by civil authority—made in our state—and made in the name of and by the authority of our constitution.

This act of Nebraska insofar as it deprives a person wrongfully injured from suing under his common law remedies or other remedies for damages amounting to a property right is unconstitutional.

* * *

We come next to a reply to counsel's defense of the constitutionality of this act. I challenged this act with good, wholesome court decisions, free and unafraid. The answer they have made was a spew of words attempting to get through the constitution with that damnable subterfuge called a contract. If that disease germ upon constitutional legislation be not recognized as spurious and be not exposed to the light of a constitution in any country that has a constitution permitting this parasite to prey upon it.

Any unconstitutional act on earth can be so framed with clubs and spikes that even the few who understand can be herded together with the great body of ignorance so that none will protest. The laborer by his ignorance is silent and this silence is called consent to rape the constitution. Some classes of employers are threatened with a removal of privileges and are thus, figuratively speaking, blackmailed into silence and this dumbfounded quietness is more consent and the other class is bribed with immunity from liability suits for criminal negligence and they consent with a whoop.

I say this scheme—this subterfuge—is a plan which, if countenanced, will, in my judgment, be setting a precedent for the ultimate crippling if not downfall of all courts. Let us see.

Could not a bill be framed to wipe out appeals and dodge the constitution with some provision of silence being construed into consent? Where would this encroachment stop if our courts permit this subterfuge to stand?

I have pointed out a thing the courts know from general history and that is that this scheme is a creature of the insurance trust, a product of infamy in the crooked use of the millions of its accumulations from favors somewhat questionable in its very incipient creation, so far as Nebraska is concerned.

This development of Workmen Compensation (?) Law in utter disregard of constitutions is exceeded in boldness by no other evil—not even that of the liquor traffic. We had an awful struggle with liquor—it ruined the peoples of nations and demoralized someone close to every home. Through the whole period we laid official hands upon every drunkard and every man actually under its influence—we restrained him, locked him up, and took his liquor away.

Today money has become as intoxicating—it has made men drunk with its power. It does not know where to stop.

I am not advocating nature's remedy of barbarians and vandals who sometime in the future would overrun the race and take it away more unscientifically yet more effectually than we take liquor away from the drunkard who was harming both himself and the public, but my prayer is to one body of that greatest functioning branch of self-government the world has ever known—the saving force of tottering nations—will you keep crooked fingers and dirty hands off our constitution?

The case of *New York Central R. R. Co.* v. *White*, 61 L. Ed. 667, was cited by defendant.

In this case whatever the court said in reference to the employee is obiter. The question presented was by an employer who confessedly profits by this act and who does not sacrific his property.

The case was not presented on behalf of men who lost legs and arms by negligence—by the wrongs of others—and who

were given an inadequate settlement which is not compensation because it does not compensate.

That court announces no man has a vested right in a rule of action which I concede, but when a remedy affording compensation is repealed and one giving half or a tenth compensation is substituted it is as unconstitutional as if the act absolutely confiscated all.

It is true laws may be enacted and repealed as to whether certain things are or are not negligence. But, when they say that losing a leg is not losing a leg, the assertion is not law or philosophy. They take away the remedy which condition is equivalent to the taking of a leg by legislative act without compensation. This result means you may take the leg and not pay for it.

It is no better to say that when by violating law or contract a man's leg is taken it is not negligence, he has not done wrong, is not answerable for it and the guarantee of the constitution against taking his property without compensation is not violated.

Such decisions would be the boldest precedent for sustaining legislation, wiping out accumulated wealth by the decisions of a confiscation commission to decide on a property schedule whatever land a trespasser gains possession of or whatever property a thief steals. One class of stealing may be dignified or glorified as well as another. But what I ask is not to glorify any evil, but to get back to safe and sound constitutional acts.

Justice Pitney has reserved in the opinion quoted the real question that we raise when inadequate compensation is substituted for a terrible injury, because he says at the bottom of page 205 of volume 243 of the Supreme Court Reports of the United States, recently decided:

> "This, of course, is not to say that any scale of compensation, however insignificant on the one hand or

> onerous on the other, would be supported. In this case no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. *Any question of that kind may be met when it arises.*"

It has arisen and now is the time to meet it. Nebraska has the privilege of getting courts upon solid ground. Everyone knows the schedule is uncompensatory. We raise the question both generally and specifically. Nothing is allowed or practically nothing for a brain injury as is the case of injury to procreation. Every attempt for any serious injury is on its face abortive. This law was gotten up and put through the legislature by an insurance lobby to beat the poor man and save money for the employer and make money for insurance companies. The constitution was made to check just such imposition. But can they fool the people?

The plan of taking money from the employer, not to compensate for his negligence but merely to render charity to the unfortunate as a charge upon the business, has been likened unto the communist idea of reasoning that the inequality of the very rich and the very poor justifies a division to the end of greater general happiness and natural justice. This may be implied from the sympathetic reasoning of Justice Pitney. A great deal of socialistic philosophy about injustice suffered by the poor and delay of courts, or, court and lawyer evil, is urged for sustaining this harsh revolutionary act by "option" —by "contract." If this precedent be set, look out for results.

We might draw from that argument that increased happiness means increased health. From this but one more step "justifies" it as a pseudo legal proposition of health under the radical and dangerously broadened police power. No one may dispute that this would save the public from the near-indigent becoming charges upon the public. So I may well caution those members of the judiicary who fear an onward march

of socialism towards communism, that this class of legislation is a broad invitation to that scourge against which the courts have been invoked so often in the protection of property rights.

The argument that the risk of accident should be borne by the employer and charged back to the public may sound just, but it is selfishly socialistic. It is an example of dividing up, but it is such selfish and unjust dividing of property. It takes from the poor to give to the rich as arbitrarily as Karl Marx ever proposed the reverse. It is infinitely worse than Marx, because there is no good purpose about the act. This is a new named socialism—socialism reversed—a back-firing socialism. It is, I repeat,—the taking from the poor to divide up with the rich. How long before the principle will be reversed in fury and the rights of property to tread under foot by taking from the rich to divide with the poor—you set the precedent?

If what has been done may be done under the trick of "contract," I could draw a bill to take money, land and, property away from the money drunkard to support the moneyless class and sustain it by oncoming judges under the precedent set by the outgoing judges.

I could provide hospitals for the hungry and tax the owners of elevators and mills and banks and packing houses, or agitate wealth, to feed the poor who are ever willing to be fed and who would vote for their feed instead of working for it, and thus become still poorer until the whole fabric of industry would break down. This act of violating the constitution by the rich is an act for their own undoing. Haman was hung upon his own gallows—the inventor of the guillotine had his own head cut off with one of his machines and the principle of being destroyed by his own petard has a long list of the same kind of tragedies.

Will this scheme of some of the rich to tear down the constitutional protection of the poor be another act of a Samson —reversed only in purpose, but destroying a temple that will fall upon these money-Samsons and no longer protect them and their property?

It all depends on the courts. The only value of a constitution is the fact that we have courts to head off even sporadic popular measures contrary to that grand instrument of restraint. Just courts will even stop just measures when contrary to that document, because if they do not respect the constitution even by sacrifice, what will become of its value when interposed against unjust measures by selfish officers?

Whenever we find a method of driving through or circumventing the constitution we might as well have none, and the country will be tossed about on the crest of rolling waves: sometimes for one thing, sometimes for another. Any political party might start a hurrah and rush into power on some unscientific catchy demand, rush it through congress, and then impeach a judge who would refuse to follow the precedent established to "contract" the measure through the constitution.

Just a little exercise of the imagination will soon show what this travesty means.

Do not think I am narrow enough to make this argument just for a fee. That is not so, but I am making it in the broadest sense, just as though I lived in association with Marshall or Chase or Webster or Clay, and just as though I was a great constitutional lawyer. I am simply trying my best in this case, in spite of handicaps and largely by such reasons as we may draw from the situation.

If John Marshall and Salman P. Chase were back on earth and on the bench there might not be a response. Perhaps encouragement for hope or perhaps no necessity to make an effort. But as a new man, in a new time, before newer

judges, I might falter, but before our court, on our constitution, I will not desert my duty in doing the best I can for both my client and the greater interest—the stability of my government. If we win here what court of a sister state or the nation could answer the reason capable of fortifying a just judgment of this court?

I have heard it said that a good book may sometimes do more for humanity than a great battle. That being true, I take courage in writing these few pages for a righteous protest against an unrighteous abuse. If I have written upon a great cause I feel it is, it is because in my heart and in my bones I have a feeling that I can present a little of much that exists of the tremendous truth against this awful travesty. I will take my stand on this question against all the adverse decisions I have ever read and be condemned and forgotten in a lost battle, or I will be a soldier in the service of this court when a great opinion is written turning the tide of a most damnable abuse and breaking through the battle line of money with as good a fight as soldiers wage with rifle, tank, or gas.

The argument of a just opinion of a court halting a great procession of error is the most powerful explosive on earth. It is not instantaneous and over, but it never ceases to widen. It might take weeks and months and years as it gradually expands and overcomes all opposition of error.

If this little short statement be right and rings in harmony with the constitution, it will be only as a percussion cap sets off an explosion, that will produce that potential opinion, which should blow these devils out of their hellish sanctuaries.

If constitutions are cumbersome and a nation is only the living men of the time and courts have no desire to leave the bench and leave this world better for having lived, I have simply wasted breath, or what is still cheaper, a few gusts of

thought-impulses. But nature creates so much for waste that I shall not despair.

If this be right it will prevail. If the pendulum starts back in this court—the truth you announce cannot be annihilated and your service to humanity in preserving constitutions will be looked upon by coming generations as a blessing of justice.

Speaking of constitutions, they are made not merely for those who live, but their safety provisions against sporadic attacks are made because a government not only embraces those living at a given time, but those dead and those yet to be born—we all have rights deserving of protection. While I live I will shout my dying protest for the benefit of the unborn, in the courts and in the streets, against all legislative acts and all previous decisions that I conscientiously believe to be violative of the constitution. I will give up on the particular case when beaten, and when that client's interest is ended, but I will urge it again and again in new cases and before new courts and new legislators so long as I am an officer of this court, having also taken an oath to support that constitution and I will, so help me God.

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